Supreme Court, U.S.
FILED

No. ____

94-72 JUL 11 1994

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

SANDLER ASSOCIATES, L.P. *et al.*,

*Petitioners*,

—against—

BELLSOUTH CORPORATION *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

DAVID F. DOBBINS
*Counsel of Record*
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 698-2500

SAUL, EWING, REMICK & SAUL
222 Delaware Avenue
P.O. Box 1266
Wilmington, Delaware 19899
(302) 421-6800

*Attorneys for Petitioners*

## QUESTIONS PRESENTED

A state court approved a mandatory settlement of a securities law class action brought under state law which at the time of settlement sought money damages only. The settlement was made between an acquiring corporation and holders of about .01% of the publicly held shares of the acquired corporation over the objections of some 25% of the publicly held shares of the acquired corporation who wished to opt out of the proposed settlement and pursue a federal class action under the federal securities laws. The federal courts below ruled that a release based on the mandatory settlement of the state class action barred prosecution of the federal securities law action. The case presents the following questions:

1. Should a federal court refuse to enforce a prior state class action mandatory settlement and release on the ground that objecting members of that state class had a due process right under the Fourteenth Amendment to opt out of a class action asserting monetary claims on their behalf?

2. Does the destruction by a mandatory settlement in a state class action of individual federal subject matter claims for money damages cognizable exclusively in federal courts constitute a denial of due process under the Fifth Amendment and a denial of the right to trial by jury under the Seventh Amendment?

## THE PARTIES TO THE PROCEEDINGS

Petitioners Sandler Associates, L.P. and Daniel E. McCarthy were plaintiffs below. Respondents BellSouth Corporation, Mobile Communications Corporation of America, Mobile Telecommunication Technologies Corp., BLS Acquisition Corp. I, Inc., Xavier W. Nady, John N. Palmer, C. Victor Raiser, II, Thomas G. Barksdale, R. Faser Triplett, M.D. and E. Lee Walker were defendants below.

## TABLE OF CONTENTS


QUESTIONS PRESENTED . . . . . i

THE PARTIES TO THE PROCEEDINGS . . . . . ii

TABLE OF AUTHORITIES . . . . . v

STATEMENT OF JURISDICTION . . . . . 1

STATEMENT OF THE CASE . . . . . 1

The Facts . . . . . 5

A. The Prior State Court Proceedings . . . . . 5

B. The Misrepresentations and Non-Disclosures in the Proxy Statement . . . . . 6

C. The Litigations in the Delaware State Courts . . . . . 7

D. The Lack of Meaningful Discovery in the Delaware State Court on the Critical Issue of Collusion or Coercion . . . . . 10

E. The Rationale of the Delaware State Court for Imposing a Mandatory Settlement . . . . . 11

F. The Rulings of the Delaware Federal District Court and the Third Circuit . . . . . 14

REASONS FOR GRANTING THE WRIT . . . . . .

I. SETTLEMENTS OF CLASS ACTIONS FOR MONEY DAMAGES ARE CONSTITUTIONALLY REQUIRED TO PROVIDE MEMBERS OF THE CLASS THE RIGHT TO OPT OUT . . . . . 17

A. The Right to Opt Out of a Class Action Seeking Money Damages Only is Protected by the Fourteenth Amendment . . . 18

B. The Inapplicability of the Full Faith and Credit Act . . . . . 21

C. The Artifice of Affixing a Rule 23(b)(1) or (b)(2) Label to a Class Action Seeking Money Damages Only Should Not Empower A Court to Destroy Opt Out Rights . . . . . 24

II. THE DESTRUCTION IN THE MANDATORY STATE COURT SETTLEMENT OF FEDERAL SUBJECT MATTER CLAIMS AT LAW PRESENTS QUESTIONS UNDER BOTH THE FIFTH AND SEVENTH AMENDMENTS . . . . . 26

CONCLUSION . . . . . 30

APPENDIX:

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (April 12, 1994) . . . . . 1a

ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE (August 12, 1993) . . . . . 3a

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE (August 3, 1992) . . . . . 30a

AMENDED CLASS ACTION COMPLAINT . . . . . 33a

ORDER OF THE SUPREME COURT OF THE STATE OF DELAWARE (FEBRUARY 4, 1992) . . . . . 69a

ORDER AND FINAL JUDGMENT OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY (February 6, 1991) . . . . . 71a

MEMORANDUM OPINION OF THE DELAWARE COURT OF CHANCERY (January 7, 1991) . . . . . 76a

MEMORANDUM AND ORDER OF THE DELAWARE COURT OF CHANCERY DENYING MOTION FOR PRELIMINARY INJUNCTION (March 29, 1989) . . . . . 108a

ARTICLE IX OF AGREEMENT AND PLAN OF REORGANIZATION DATED AS OF FEBRUARY 19, 1988, AMONG MCCA, COM/NAV MARINE, INC., BELLSOUTH CORPORATION AND BLS ACQUISITION CORP. I, INC. . . . . 113a

PROXY STATEMENT DATED JULY 21, 1988 ISSUED BY MCCA FOR AUGUST 24, 1988 SPECIAL MEETING OF STOCKHOLDERS (Excerpt from pp. 19-20) . . . . . 115a

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE . . . . . 120a

## TABLE OF AUTHORITIES


Page

Affiliated Ute Citizens v. United States,
406 U.S. 128, reh'g denied,
407 U.S. 916 (1972) . . . . . 10

Allen v. McCurry, 449 U.S. 90 (1980)
830 F.2d 872 (8th Cir. 1987) . . . . . 15, 21

Anderson v. John Morrell & Co.,
830 F.2d 872 (8th cir. 1987) . . . . . 3

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959) . . . . . 4

Berry Petroleum Co. v. Adams & Peck,
518 F.2d 402 (2d Cir. 1975) . . . . . 2

Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978),
cert. denied, 444 U.S. 883 (1979) . . . . . 3, 25

Bokat v. Getty Oil Co.,
262 A.2d 246 (Del. Supr. 1970) . . . . . 12

Brown v. Ticor Title Ins. Co.,
982 F.2d 386 (9th Cir. 1992), cert. granted,
___ U.S. ___, 114 S. Ct. 56 (1993), cert.
dismissed, ___ U.S. ___, 114 S. Ct. 1359 (1994) . . 25

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) . . . . . 20

Compagnie des Bauxites de Guinee v.
L'Union Atlantique S.A. D'Assurances,
723 F.2d 357 (3d Cir. 1983) . . . . . 15

Consolidated Gold Fields PLC v. Minorco,
S.A., 871 F.2d 252 (2d Cir.),
cert. dismissed, 492 U.S. 939 (1989) . . . . . 12

Cox v. American Cast Iron Pipe Co.,
784 F.2d 1546 (11th Cir. 1986) . . . . . 25

Page

Dofflemyer v. W.F. Hall Co.,
558 F. Supp. 372 (D. Del. 1983) . . . . . 28
Eisen v. Carlisle & Jacquelin,
391 F.2d 555 (2d Cir. 1968) . . . . . 25
Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) . . . . . 2, 15, 18, 21
Fortner v. Thomas,
983 F.2d 1024 (11th Cir. 1993) . . . . . 3
Franke v. Kroger Co.,
649 F.2d 1216 (6th Cir. 1981), reh'g denied,
670 F.2d 71 (6th Cir. 1982) . . . . . 20
Gimbel v. Signal Cos.,
Del. Ch., 316 A.2d 599 (Del. Ch.),
aff'd, 316 A.2d 619 (Del. Supr. Ct. 1974) . . . . . 12
Girsh v. Jepson, 521 F. 2d 153 (3d Cir. 1975) . . . . . 23
Green v. Occidental Petroleum Corp.,
541 F.2d 1335 (9th Cir. 1976) . . . . . 12
Greenfield v. Villager Indus., Inc.
483 F.2d 824 (3d Cir. 1973) . . . . . 23
Grimes v. Vitalink Communications Corp.,
17 F.3d 1553 (3d Cir. 1994) . . . . 2, 3, 4, 16, 21, 23, 27
Haize v. Hanover Ins. Co,
536 F.2d 576 (3d Cir. 1976) . . . . . 15
Hansberry v. Lee,
311 U.S. 32 (1940) . . . . . 11
Holmes v. Continental Can Co.,
706 F.2d 1144 (11th Cir. 1983) . . . . . 3, 25
In Re Armored Car Antitrust Litigation,
645 F.2d 488 (5th Cir. 1981) . . . . . 2
In Re A.H. Robins Co.,
880 F.2d 709 (4th Cir.),
cert. denied, 493 U.S. 959 (1989) . . . . . 4, 29
In Re Bendectin Products Liability Litigation,
749 F.2d 300 (6th Cir. 1984) . . . . . 13
In Re Colt Indus. Shareholder Litig.,
566 N.E.2d 1160 (1991) . . . . . 23

Page

In Re Dennis Greenman Securities Litigation,
829 F.2d 1539 (11th Cir. 1987)
reh'g denied, 840 F.2d 25 (11th Cir. 1988) ..... 13, 25
In Re Four Seasons Sec. L Litig.,
493 F.2d 1288 (10th Cir. 1974) ..... 2
In Re General Motors Corp. Engine Interchange
Litig., 594 F.2d 1106 (7th Cir.), cert. denied,
444 U.S. 870 (1979) ..... 13, 23
In Re Real Estate Title & Settlement Serv.
Antitrust Litigation, 869 F.2d 760 (3d Cir.)
cert. denied, 493 U.S. 821 (1989) ..... 23, 25
In Re Temple (Raymark Industries),
851 F.2d 1269 (5th Cir. 1988) ..... 24
Johnson v. General Motors Corp.,
598 F.2d 432 (5th Cir. 1979) ..... 3, 25
Kalb v. Feuerstein, 308 U.S. 433 (1940) ..... 26
Kremer v. Chemical Constr. Corp.,
456 U.S. 461, reh'g denied,
458 U.S. 1131 (1982) ..... 22
Mateo v. M/S Kiso,
805 F. Supp. 761 (N.D. Cal. 1991) ..... 12
McDonnell Douglas Corp. v. United States Dist.
Court, Central Dist. of California,
523 F.2d 1083 (9th Cir. 1975) ..... 12
Mills v. Electric Auto Lite Co.,
396 U.S. 375 (1976) ..... 12
National Super Spuds, Inc. v.
New York Mercantile Exchange,
660 F.2d 9 (2d Cir. 1981) ..... 2, 23, 27, 28, 29
Northeastern Telephone Co. v. American
Telephone and Telegraph Co.,
651 F.2d 76 (2d Cir. 1981),
cert. denied, 455 U.S. 943 (1982) ..... 7
Nottingham Partners v. Trans-Lux Corp.,
925 F.2d 29 (1st Cir. 1991) ..... 2, 3, 4, 8, 14, 21
Officers for Justice v. Civil Service Commision
688 F.2d 615, 634-35 (9th Cir. 1982) ..... 25

Page

Old Wayne Mutual Life Ass'n v. McDonough,
204 U.S. 8 (1907) . . . . . 22
Paragraph Communications, Inc. v. Time, Inc.,
Fed. Sec. L. Rep. (CCH)
¶ 94514 (Del. Ch. 1989) . . . . . 9
Petroleum Products Antitrust Litigation,
906 F.2d 432 (9th Cir. 1990),
cert. denied, 464 U.S. 1068 (1991) . . . . . 7
Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) . . . . . 3, 15, 18, 20, 25, 26
Piambino v. Bailey, 610 F.2d 1306 (5th Cir.),
cert. denied, 449 U.S. 1011 (1980) . . . . . 23
Plummer v. Chemical Bank,
91 F.R.D. 434 (S.D.N.Y. 1981), aff'd,
668 F.2d 654 (2d Cir. 1982) . . . . . 20
Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. Supr. Ct. 1986) . . . . . 9
Ross v. Bernhard, 396 U.S. 531 (1970) . . . . . 4
Ticor Title Insurance Co. v. Brown, cert. granted,
___ U.S. ___, 114 S. Ct. 56 (1993), cert. 1, 2, 13
dismissed, ___ U.S. ___, 114 S. Ct. 1359 (1994) 17, 24
TSC Indus., Inc. v. Northway, Inc.,
426 U.S. 438 (1976) . . . . . 10
Umbriac v. Kaiser,
467 F. Supp. 548 (D. Nev. 1979) . . . . . 10
United States v. United States Fidelity &
Guaranty Co., 309 U.S. 506 (1940) . . . . . 26
Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083, 111 S. Ct. 2749 (1991) . . . . . 10
Weinberger v. Kendrick,
698 F.2d 61 (2d Cir. 1982), cert. denied,
464 U.S. 818 (1983) . . . . . 23
Wright v. Collins, 766 F.2d 841 (4th Cir. 1985) . . . . . 3
Wyatt v. Horsely,
793 F. Supp. 1053 (M.D. Ala. 1991) . . . . . 20
Zimmerman v. Bell,
800 F.2d 386 (4th Cir. 1986) . . . . . 12

Page

STATUTES AND RULES


U.S. Const. Amend. V . . . . . 1, 26
U.S. Const. Amend VII . . . . . 1, 26, 27, 29, 30
U.S. Const. Amend. XIV, § 1 . . . . . 1, 17, 18, 23
Full Faith and Credit Act . . . . . 1, 4, 15, 16, 21-23, 27
28 U.S.C. § 1738
Securities Exchange Act of 1934 . . . . . 10, 26, 27
15 U.S.C. § 78j . . . . . 8
15 U.S.C. § 78n . . . . . 8
15 U.S.C. § 78a . . . . . 4
15 U.S.C. § 78aa . . . . . 1
Fed. R. Civ. P. 23
Fed. R. Civ. P. 23(a) . . . . . 13
Fed. R. Civ. P. 23(b) . . . . . 1, 13
Fed. R. Civ. P. 23(b) (1) . . . . . 1, 16, 24, 25, 29
Fed. R. Civ. P. 23(b) (2) . . . . . 15, 16, 25
Fed. R. Civ. P. 23(b) (3) . . . . . 1, 12, 19, 24, 25
Fed. R. Civ. P. 23(c) (2) . . . . . 12, 19, 24, 25
Fed. R. Civ. P. 23(c) (3) . . . . . 24
Fed. R. Civ. P. 23(d) . . . . . 25


OTHER AUTHORITIES


Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 STANFORD L. REV. 497, 597 (1991) . . . . . 5

American Lawyer, December of 1989, p. 67 . . . . . 10

Borden, The Shareholder Suit Charade, The American Lawyer, December of 1989, p. 67 . . . . . 9

Page

Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 714-20 (1986) . . . . . 5

Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 LAW & CONTEMP. PROBS. (Summer 1985) 5, 26-33 . . . . . 5

Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 MD. L. REV. 215, 232-33, 239-46 (1983) . . . . . 5

Esquire, Feb. 1990, pp. 47-48 . . . . . 10

Franklin, Shifting Fight to the State on Hostile Bids, The National Law Journal, Sept. 25, 1989, p.1 . . . . . 9

Hart & Wechsler's, The Federal Courts and Federal System pp. 1627-30 (3d Ed. 1940) . . . . . 21

3B J.W. Moore 7 & J.E. Kennedy, Moore's Federal Practice ¶ 23.35[1] (2d Ed. 1993) . . . . . 12

H.B. Newberg, Newberg on Class Actions § 8.04 at 8-15; § 16.15 at 16-80-16-83 (3rd Ed., 1992) . . . . . 18,

Nicora, Delaware Puts Out, Esquire, Feb. 1990, pp. 47-48. . . . . 10, 26

Norris, Managers Win One, The New York Times, July 16, 1989, A22 . . . . . 9

Restatement of Judgment 2d,
§ 27 (1983), § 12 (1983) . . . . . 15, 21

Supplementary Note of Advisory Committee
Regarding 1966 Amendment to Rule 23,
Annotations to Rule 23, 18 U.S.C.A. . . . . 18

7B Charles A. Wright et al., Federal Practice and
Procedure: Civil 2d § 1789, at 240
(2d ed. 1986). . . . . 18

## STATEMENT OF JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1). The Order of the Court of Appeals for the Third Circuit was entered on April 12, 1994 and is not yet reported. The District Court Decision is reported at 818 F. Supp. 695 (D.Del. 1993). This case involves the Fifth, Seventh and Fourteenth Amendments, the Full Faith and Credit Act, 28 U.S.C. § 1738, and provisions of and rules promulgated under the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq. The above decisions and provisions are reproduced in the Appendix.[1]

## STATEMENT OF THE CASE

The first question presented is essentially the one that was to be resolved in Ticor Title Insurance Co. v. Brown, cert. granted, __ U.S. __, 114 S.Ct.56 (1993), ("Ticor"). In dismissing Ticor as improvidently granted, __ U.S. __, 114 S.Ct. 1359 (April 4, 1994), six of the justices of this Court were of the view that the constitutional question of the right to opt out of a class action for money damages was not squarely presented because there was "at least a substantial possibility" that class actions seeking money damages require certification under Rule 23(b)(3), F.R.Civ.P. This case does not present such a problem. The class action here, although one for money damages only at the time the settlement was made and approved by the state court, was not certified under the Delaware analogue to Rule 23(b)(3), but rather (b)(1) and/or (b)(2). The court below[2] dismissed on the ground that federal courts were required to give preclusive effect under the Full Faith & Credit Act, 28 U.S.C. § 1738, to the denial of the right to opt out by the state court without regard to the mandates of the Constitution or F.R.Civ.P., Rule 23(b).

---

[1] References to pages in the Appendix are hereinafter cited as "____a."

[2] Federal jurisdiction in the District Court for the District of Delaware, the court of first instance, was based on 15 U.S.C. Section 78a and 28 U.S.C. § 1331. Federal subject matter jurisdiction is exclusive. 15 U.S.C. Section 78aa.

This case squarely presents the issue of the constitutional boundaries of the right to opt out of a class action for money damages. That right was denied and a mandatory settlement was made here in the state court; it was enforced by the District Court of Delaware, and affirmed by the Third Circuit, without opinion, on the basis of its decision in Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994) ("Grimes") which, as explained below, is both constitutionally infirm and inapposite to this case.[3]

The impetus for federal court approval of mandatory state court settlements of class actions denying class members the right to opt out emerged in Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991). It was followed by the Third Circuit's decision in Grimes and then in this case. The rationale in these cases is that by appearing and objecting to denial of the right to opt out, a class plaintiff forfeits that right. The Ninth Circuit's decision in Ticor, 982 F.2d 386 (9th Cir. 1992), and decisions in other circuits, implicitly reject this rationale.[4] Resolving this apparent conflict in circuits presents another reason for granting this petition.

This case presents an extreme example of such coercive class action settlements now emerging to destroy individual claims for money damages. It squarely poses the question of whether this Court's ruling in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974), that each member of a class for money damages "may

---

[3] The plaintiffs in the Grimes case filed a petition for certiorari, Dkt. No. 93-2098, on June 29, 1994 on the basis that their right to opt out of another Delaware state court mandatory settlement for equitable relief and pursue federal securities law claims for money damages was unconstitutionally denied to them.

[4] See, e.g., In re Four Seasons Securities Laws Litigation, 493 F.2d 1288 (10th Cir. 1974); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975); National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981); In re Armored Car Antitrust Litigation, 645 F.2d 488 (5th Cir. 1981).

request exclusion from the action and thereby preserve his opportunity to press his claim separately . . ." was constitutionally mandated. The basic inquiry is whether the two lower federal courts here misapplied this Court's ruling in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), "that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."

From this, it does not follow, as the lower courts concluded in this case, that class plaintiffs who are no longer absent because they object to the denial of their opt-out in a mandatory settlement thereby forfeit their constitutional right to opt out on behalf of themselves and for the whole class.

Nonetheless, the question of whether the constitution requires an opt-out from a class action which does not involve a limited fund or complex equitable relief and which is solely for money damages has never been explicitly resolved. Even in those situations where there is a limited fund or where the settlement is predominantly equitable in nature, opt-outs to pursue money damages claims which are not inconsistent with the equitable relief embodied in the class action are permitted where feasible, and in some cases required, in order to satisfy the demands of due process[5] Here, unlike the situation in Nottingham Partners, supra, which settled a shareholder's derivative suit, or in Grimes which also involved a settlement for equitable relief, the state court action, when settled, was one for money damages only.

The second question is of importance in the area of federal/state court relations; it presents underlying issues closely

---

[5] See Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979); Fortner v. Thomas, 983 F 2d 1024, 1031-32 (11th Cir. 1993) (prisoner's claim for individual monetary damages not barred by class action seeking only injunctive or declaratory relief); Anderson v. John Morrell & Co., 830 F.2d 872, 877-78 (8th Cir. 1987); Wright v. Collins, 766 F.2d 841, 847-48 (4th Cir. 1985); Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983); Bogard v. Cook, 586 F.2d 399, 409 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979).

related to the first question and should be resolved with it. It deals with the issue of whether there is a constitutionally protected right to opt out of a mandatory state court settlement for money damages to pursue exclusive federal subject matter claims for damages -- here, claims brought under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.

Both the instant case, as well as Grimes and Nottingham hold that no such constitutional protection exists. No other cases have so held. In reaching this anomalous result, both the Third Circuit and First Circuit sought to whitewash the constitutional problems flowing from a state court's destruction of federally created causes of action by invoking the Full Faith and Credit Act, 28 U.S.C. § 1738 -- the same concept which they also invoked to avoid the due process problems in the first question presented. As discussed below, however, a constitutionally infirm state court order cannot be given full faith and credit.

In addition, inherent in the state court's destruction of these federally created causes of action was the destruction of the class plaintiffs' right to a federal jury trial for the federal subject matter claims. Jury trials are required in federal class action proceedings for damages at law. See Ross v. Bernhard, 396 U.S. 531, 541 (1970). The right to jury trial "cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959). Indeed, a federal court could not have done so in a federal class action certified under Rule 23(b)(1) as the Fourth Circuit recognized in In re A.H. Robins Co., 880 F.2d 709, 745 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

The mandatory settlement in a Delaware state court action deprived the Sandler plaintiffs and the rest of the class of these constitutionally protected federal rights. The Third Circuit's decision here, if not reviewed by this Court, invites judicial chaos. The regional area of the Third Circuit includes the State of Delaware where many, if not most, of the major publicly-held corporations are domiciled.

## THE FACTS

The relevant facts are simple, and for the most part not in dispute.

### A. The Prior State Court Proceedings

The case below followed a familiar, although widely criticized pattern for settlement of shareholders' suits in the Delaware Chancery Court.[6] It had the following commonplace characteristics for such settlements:

> A settlement secretly negotiated before the class was certified with attorneys representing an infinitesimal number of shares.
>
> Attorneys' fees for settling plaintiffs' counsel negotiated as part of the settlement package.
>
> A "clear sailing" agreement as to that fee -- $1 million -- for a few hours of work.
>
> Settlement of bona fide claims -- the claims sued on here -- for mammoth damages ($800 million) for a paltry sum ($18 million).
>
> A sweeping release purporting to wipe out all claims by any class member in any forum.

---

[6] Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 STANFORD L. REV. 497, 597 (1991); Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 LAW & CONTEMP. PROBS. (Summer 1985) 5, 26-33; Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 MD. L. REV. 215, 232-33, 239-46 (1983)

## B. The Misrepresentations and Non-Disclosures in the Proxy Statement

This federal class action for money damages only under the federal securities laws is based upon misrepresentations and non-disclosures in a July 1988 Proxy Statement which sought Mobile Communications Corporation of America ("MCCA") shareholder approval for the BellSouth Corporation ("BellSouth") acquisition of MCCA.

The Merger Agreement was subject to a series of judicial and regulatory approvals which would take many months to complete. In view of this anticipated delay, and the known rising values for cellular companies such as MCCA, the Agreement contained a critical provision (§ 9.01(f)) which appeared to give MCCA the right to terminate the transaction upon payment of a $25 million cancellation fee. (113 a). The Proxy Statement, however, provided no meaningful disclosure of BellSouth's construction of this termination provision, which was first revealed to MCCA shareholders on the eve of the consummation of the merger: a virtually irrevocable call in favor of BellSouth at the relatively low price set in the Merger Agreement. The only disclosure in the Proxy Statement (115 a) consisted of essentially a verbatim repetition of the complex termination clause of the Merger Agreement without any explanation.

The existence of this irrevocable call was highly material. Through 1988 and continuing through the consummation of the acquisition in April of 1989, the prices of cellular telephone properties were skyrocketing. By early 1989, it was clear that MCCA was worth far more than $31 per share, or the $75 "per pop"[7] price at which the investment community valued the merger.

---

[7] Cellular properties are typically valued on a "per pop" basis, referring to the population within the particular market and the price paid per population unit. Depending upon the size, percentages and number of franchises a cellular company owns, it can be said to have a total number of "pops," and the company can then be valued by multiplying that number by the current generally accepted average estimate of a "pop" in the particular markets served.

These figures paled in comparison to the true value of MCCA as reflected in prices then being paid for cellular properties comparable or inferior to MCCA's properties. Indeed, the contemporaneous acquisition by McCaw of Lin Broadcasting was agreed on at the price of almost $300 per pop -- four times the price BellSouth would pay for MCCA. Expert appraisals valued MCCA's assets at between $210 and $250 per pop. If the shareholders had known of the existence of BellSouth's call, the narrow vote ratifying the Merger Agreement -- only 60% of the publicly held shares voted in favor -- would arguably (at the very least) have been different.

### C. The Litigations in the Delaware State Courts

Due to this dramatic increase in MCCA's value, in February, 1989, BellSouth commenced a declaratory judgment action in the Delaware Chancery Court against MCCA seeking a declaration that MCCA had no power under the Merger Agreement to terminate the merger by paying the termination fee. This suit was facially collusive. Rather than opposing BellSouth or at the very least remaining neutral, MCCA immediately filed an answer which "admitted" that it was bound to go ahead with the merger, blessed BellSouth's arcane interpretation of the termination provision and joined in its request for a declaration that MCCA was powerless to terminate. The irrationality of this position, which was clearly contrary to the best interests of MCCA shareholders, supports an inference of coercion and concert of action.[8]

BellSouth's preemptive and collusive suit was obviously intended to forestall the plaintiffs here from prosecuting the federal court action. MCCA's acquiescence in BellSouth's position left the Sandler plaintiffs, who themselves held 3% and represented another 22% of the outstanding publicly-held stock of MCCA, no

---

[8] Petroleum Products Antitrust Litigation, 906 F.2d 432, 446-448 (9th Cir. 1990), cert. denied, 464 U.S. 1068, 111 S. Ct. 2274 (1991); Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76, 95 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

alternative but to follow it into the Delaware Chancery Court to file an action to enjoin the merger.[9] Two days later, counsel for two small MCCA shareholders followed with virtually identical complaints. These lawyers shortly thereafter made the mandatory no opt-out settlement in that Delaware Chancery Court for a relatively meager $18 million to the shareholders and a $1 million fee for themselves.

The Sandler plaintiffs' attempt to enjoin the merger in the Delaware state courts in the Spring of 1989 were unsuccessful (108a) as was their subsequent attempt to block approval of the settlement as grossly inadequate (76a), despite the fact that absent class members with over 22% of the publicly held stock of MCCA holdings opposed the settlement, and no shareholders other than two small settling shareholders were for it.

The proxy statement merely reiterated the termination provision in the Merger Agreement. It was facially ambiguous, providing that the merger "may be terminated and the Merger may be abandoned at any time prior to the [merger], before or after the approval of the shareholders of [MCCA], and could be terminated if the Board of Directors" of MCCA determined that "its fiduciary duties to the Company's shareholders require that it: 1) not recommend approval of this Agreement by the Company shareholders, or that it withdraw such recommendation." (113-114a) A federal jury in a case brought under §§ 10b and 14(a) of the 1934 Act, U.S.C. §§ 78j and n, could have found that BellSouth's counter-intuitive interpretation was not adequately disclosed.

---

[9] In view of its preemptive state court suit, we find it ironic that BellSouth has constantly claimed that the Sandler plaintiffs forfeited the right to opt out by contesting BellSouth's state court declaratory action and seeking to stop the merger in the Delaware state courts, as well as by opposing the mandatory settlement. Any other course would have resulted in dismissal of the action for failure to exhaust state court remedies. Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 31 (1st Cir. 1991).

To justify settling this jury case with a $800 million liability for a de minimus sum, $18 million, or about 2 cents on the dollar, the Delaware court had to demean these claims as being virtually worthless. Thus the state court ruled that under Delaware law, the provision had "only one commercially reasonable meaning." According to that court, the proxy unambiguously disclosed that upon shareholder approval of the proposed merger, MCCA effectually forfeited its rights to terminate the merger.

The balkanization of national regulation of securities inherent in a mandatory settlement in a state court action prohibiting prosecution of those federal subject matter claims is eloquently exposed in the treatment of them by the Delaware state court here. In its view there was simply no duty under federal law to disclose to the MCCA shareholders the forfeiture of the right to terminate following shareholder approval that supposedly is buried within this complex termination provision. The Delaware state court flatly ruled:

> "Furthermore, federal securities laws impose no duty to provide legal opinions with respect to the operation and effect of § 9.01(f)(i)." (91a).

This immunization from federal regulation which requires a clear disclosure of this critical provision amounts to a revision of the federal securities laws. Delaware's desire to accommodate large corporations domiciled there may explain this immunization,[10] but does not justify it. The sole authority cited

---

[10] See Franklin, Shifting Fight to the State on Hostile Bids, The National Law Journal, September 25, 1989, p. 1, quoting the senior partner of the firm representing BellSouth in this action as calling on companies to reincorporate in states other than Delaware following the decision in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d. 173 (Del. Supr. 1986) (requiring management to consider a hostile takeover bid); Norris, Managers Win One, The New York Times, July 16, 1989, A22, commenting on the Time-Warner decision, Paragraph Communications, Inc. v. Time, Inc., Fed. Sec. Law Rptr (CCH) § 94514 (Del. Ch. 1989), following publication of a memo to firm clients of Wachtel Lipton suggesting that "perhaps it's time to

by the Chancellor for his caveat emptor redux ruling is Umbriac v. Kaiser, 467 F. Supp. 548 (D. Nev. 1979). Arrayed against this single district court opinion is a host of contrary federal decisional authority.

Under federal securities law, the adequacy of a disclosure must be judged on the basis of whether "there is a substantial likelihood that a reasonable shareholder would consider [the misstatement or omission] important in deciding how to vote." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). As this Court stated in Virginia Bankshares, Inc. v. Sandberg, 501 U.S.1083, 111 S.Ct. 2749, 2760 (1991), "[T]he point of a proxy statement, after all, should be to inform, not to challenge the reader's critical wits." It also noted that where "[i]t would take a financial analyst" to discern the truth of disclosures in the proxy statement the statement may be found to be misleading. Id. at 2760-2761. The fundamental purpose of the Securities Exchange Act of 1934 is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the security industry." Affiliated Ute Citizens v. United States, 406 U.S. 128, 151, reh'g denied, 407 U.S. 916 (1972) (inner quotations omitted).

### D. The Lack of Meaningful Discovery in the Delaware State Court on the Critical Issue of Collusion or Coercion

In the Delaware state courts as well as in the federal court below, BellSouth made much of the fact that MCCA agreed with BellSouth that the Merger Agreement could not be terminated. But MCCA's answer in the collusive lawsuit joining in BellSouth's interpretation of the acquisition agreement bears all the hallmarks of coercion by BellSouth. The only rational explanation for MCCA's joining BellSouth in asking the Delaware Chancery Court for a declaration that MCCA could not terminate the merger is that

---

migrate out of Delaware:" Borden, The Shareholder Suit Charade, The American Lawyer, December of 1989, p. 67; Nicora, Delaware Puts Out, Esquire, Feb. 1990, pp. 47-48.

BellSouth was improperly threatening the MCCA defendants with a Pennzoil v. Texaco suit if they honored their fiduciary duties to the MCCA shareholders. Indeed, the one time the attorneys for BellSouth permitted the former CEO of MCCA to testify on this issue, he admitted that BellSouth threatened suit.

The Delaware state court permitted no discovery with respect to the communications between BellSouth and MCCA or their attorneys during the months prior to the making of the settlement deal or into any other area dealing with BellSouth's coercion of MCCA.

### E. The Rationale of the Delaware State Court For Imposing A Mandatory Settlement

The Delaware state court sought to provide constitutional justification for the denial of the opt-out in this case, which at the time of settlement was made in June, 1989, was one for money damages only, by indulging in three fictions. The first was that at the time of the settlement the state court action was still a shareholders' derivative suit. Having so characterized it, the Chancery Court went on to rule:

> "The Constitution does not require (cf. Hansberry v. Lee, 311 U.S. 32 (1940)), nor do prudential considerations, in my opinion, command the granting of an opt-out right to stockholder actions attacking the propriety of director conduct in connection with a corporate merger." (106a)

But at the time of settlement, the shareholders' derivative action had become moot. At that time, the shareholders' class action sought damages only for misleading disclosures in the proxy statement issued by MCCA and BellSouth to MCCA shareholders. That acquisition had been completed in April, 1989, months prior to the filing of the instant federal securities action based on the misleading proxy statement and long before the Delaware Chancery Court approved the state court settlement wiping out these claims. (76a). Once MCCA was merged into

BellSouth, those derivative claims disappeared. Bokat v. Getty Oil Co., 262 A.2d 242 (Del. Supr. 1970).

The second fiction indulged by the Delaware Chancery Court to justify denial of the opt out to pursue these individual claims for money damages in federal court is that those claims "if proved, will support the granting of equitable relief." (105a). But there never were any federal securities law claims for injunctive relief. (See 33a). Indeed, the claims for damages under the federal disclosure laws only accrued and were only asserted after consummation of the merger. These violations, if eventually proved, could in no way satisfy the theoretical basis postulated in Mills v. Electric Auto Lite Co., 396 U.S. 375, 386-88 (1976), for "unscrambling the egg" that was this extremely complex merger. The rescission of the acquisition of MCCA by BellSouth would have been an impossible remedy.[11]

The third fiction indulged in by the Delaware Chancery Court was that "to litigate the matters separately would subject the defendant [BellSouth] to the risk of different standards of conduct with respect to the same action." This is simply a thinly disguised judicial repeal of the mandate in Rule 23(c)(2) that the "court will exclude" holders of like claims for money damages only. This has never been a reason for refusing to certify a money damage action under Rule 23(b)(3).[12] Indeed, "if the mere fact that an issue

---

[11] Gimbel v. Signal Companies, Del. Ch., 316 A.2d 599, 603, aff'd, Del. Supr., 316 A.2d 619 (1974); see also Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989).

[12] Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986) ("The danger of imposing 'inconsistent standards of conduct on the party imposing the class is also not normally posed by a request for money damages."); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.10 (9th Cir. 1976); Mateo v. M/S Kiso, 805 F. Supp. 761, 772 (N.D. Cal. 1991) ("[T]he Ninth Circuit has expressly noted that where plaintiffs' claims are for damages, thee is no possibility of judgments posing inconsistent standards." (citing McDonnell Douglas Corp. v. U.S. Dist. Court, Central Dist. of California, 523 F.2d 1083, 1086 (9th

common to two individual actions for money were held to trigger subdivision (b)(1)(A), that subdivision would swallow the rest of the rule, for the possibility that issues will be determined differently in different action exists in every action that meets the requirements of Rule 23(a)." 3B J.W. Moore 7& J.E. Kennedy, Moore's Federal Practice ¶ 23.35[1] (2d. ed. 1993). Thus, the question arises whether the interpretation by the state court of the Delaware analog to Rule 23 (b) is constitutional.

The validity of the rationale used by the Delaware Chancery Court and essentially affirmed by the Delaware Supreme Court and the two federal courts approving that settlement, namely, that a corporate defendant should be able to make a mandatory settlement with one individual securities owner binding all other holders for money damages only, is the core issue presented by this petition. The rationale used by the lower courts is equally applicable to other class action claims for money damages only, such as antitrust claims for damages, e.g., Ticor, and individual damages for products liability cases.[13]

---

Cir. 1975), cert. denied, 425 U.S. 911 (1976); In re Bendectin Products Liability Litigation, 749 F.2d 300, 305 (6th Cir. 1984) ("The fact that some plaintiffs may be successful in their suits against a defendant while other may not is clearly not a ground for invoking Rule 23(b)(1)(A)."); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1545 and 1545 n.5 (11th Cir. 1987), reh'g denied, 840 F.2d 25 (11th Cir. 1988) (holding that only actions seeking declaratory or injunctive relief can be certified under 23(b)(1)(A)).

[13] E.g., In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979); In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984).

## F. The Rulings of the Delaware Federal District Court and the Third Circuit

Following the per curiam affirmance by the Supreme Court of Delaware of the ruling of the Chancery Court (69a),[14] BellSouth moved for summary judgment in the instant case on the affirmative defense of release made between BellSouth and MCCA on the one hand and the small settling plaintiffs on the other. On its face that release purported to bar all claims by any individual shareholder of MCCA, including those for money damages asserted here under the federal securities laws.

The Sandler plaintiffs made two arguments as to why summary judgment on this affirmative defense of release should be denied: 1) issues of fact existed as to whether coercion voided the release, and 2) even if valid, the release could not constitutionally destroy the right to opt out.

On the factual issues underlying coercion, the Sandler plaintiffs sought discovery in the District Court. They pointed out that the validity of the release was never litigated in the state court, let alone fully and fairly, and that no meaningful discovery had been granted in the prior state court litigation on the issue of coercion.[15] The District Court denied this request for discovery,

---

[14] To avoid any issue of exhaustion of state remedies, the plaintiffs herein sought a petition for certiorari to review the denial of the opt-out by the Delaware Chancery Court in the state court proceeding. The First Circuit's holding in Nottingham Partners v. Trans-Lux Corp., supra, requires such an exhaustion of remedies. This Court denied the petition for certiorari on June 29, 1992, 112 S.Ct. 3032.

[15] Although the District Court noted that "plaintiffs' counsel repeatedly asked defendant Palmer (the CEO of MCCA) about pressures brought to bear by BellSouth on MCCA to close the merger deal and settle with the shareholder plaintiffs in the state court action" (27a n.12), asking questions is not equivalent to receiving answers. In the Delaware state court, the Sandler plaintiffs were consistently blocked by BellSouth into inquiring into this area of coercion except for Palmer's meager

ruling that it was "required to give Full Faith and Credit to the Delaware state court judgment," and that its inquiry was limited to "what occurred in the state court." (31a).

It then proceeded to grant summary judgment on the same basis, ruling that the Sandler plaintiffs were collaterally estopped because they had "litigated and lost" on the issue of coercion in the Delaware state court even though it was never litigated at all. Collateral estoppel, i.e., issue preclusion, comes into play, however, only when an issue of fact has been actually litigated and adjudicated in a final judgment on the merits.[16] The preclusive effect of the Full Faith and Credit Act, 28 U.S.C. § 1738, if any, is determined by application of doctrine of collateral estoppel. Allen v. McCurry, 449 U.S. 90 (1980).

With respect to the first question raised by this petition, the courts below squarely challenged this Court's protection in Eisen and Shutts of the right to opt out. The District Court held that because the Sandler plaintiffs "chose to continue to litigate their objections to the [mandatory] settlement in the Delaware state courts, [where they] were in no sense 'absentee' class members." (26a). It assumed without discussion that only "absentee" class members have the right to opt out of an action for money damages. It never faced the "Catch-22" nature of this ruling: namely, that if "absentee" class members seek to oppose the destruction of their opt out rights, they are no longer "absentee." Rather, using the trial court's own rhetoric, they have "consciously" availed themselves of the "privilege" of litigating in the Delaware courts, thereby bestowing on the Delaware state courts the power to destroy their opt-out rights.

---

answer quoted above.

[16] Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances, 723 F.2d 357, 361 (3d Cir. 1983)("For collateral estoppel to apply the parties must have had an opportunity to fully litigate the issue in the prior proceeding."); Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3d Cir. 1976); Restatement of Judgment 2d, § 27 (1983).

With respect to the second question raised by this petition, namely, the constitutionality of the destruction of exclusively federal subject matter in the mandatory state court settlement, the District Court pointed out that some settlements of class actions under 23(b)(2), not involving settlements of claims for money damages only, have released claims over which the settling court had not subject matter jurisdiction (24 a). Without further analysis, it then held that the Delaware state court properly included exclusively federal subject matter claims in the mandatory settlement, and that the Full Faith and Credit Act required the District Court to enforce that settlement.

The Third Circuit affirmed the District Court opinion without explanation other than referencing its opinion in Grimes, decided March 9, 1994. This cryptic affirmance, however, raises more questions than it answers.

First, the underlying validity of the release was not an issue in Grimes. Grimes itself notes that a release is not a valid defense if it was entered into "on the basis of deception or coercion." 17 F. 3d at 1557. In the course of the Grimes opinion, the Third Circuit never sets forth any reasons why this case, which involved claims for money damages only, both in the state court when the settlement was made, as well as in the federal court, could have been constitutionally certified under the Delaware counterpart of Rule 23(b)(1) or (2). It simply assumes without discussion that mandatory settlement in a class action for money damages only can constitutionally be imposed upon any class member who objects to its imposition. Like the District Court in this case, the Third Circuit in Grimes incorrectly assumed that the Full Faith and Credit Act applies to settlements as well as judgments, and then indulges in the fiction that "the federal non-disclosure claims were actually litigated during the state court proceedings and were conclusively resolved against the objectors," 17 F. 3d at 1562, even though there was no full adjudication of any issue.

## REASONS FOR GRANTING THE WRIT

### I. Settlement Of Class Actions For Money Damages Are Constitutionally Required To Provide Members Of The Class The Right To Opt Out

A mandatory settlement of a class action for money damages which deprives class members of their rights to opt out and pursue their actions elsewhere violates the due process clause of the Fourteenth Amendment. This petition poses a critical question which this Court was to resolve in Ticor last term and should resolve now: Is the right to opt out of a class action settlement for money damages constitutionally protected?

This case exemplifies why that question should be answered in the affirmative. If it is not, de minimus state court class action settlements, rewarding the first plaintiff to strike a lucrative deal with a deep pocket defendant, will inevitably destroy federal subject matter actions at law, thereby undermining the enforcement of national policies reflected in important areas such as antitrust and securities regulation. Here, in ratifying the mandatory settlement proposed by two small shareholders and BellSouth, the state court misapplied constitutional law prohibiting mandatory class action settlements, prejudged factual issues regarding adequacy of disclosure, eviscerated the protections of federal securities laws and ignored facially apparent issues of collusion underlying the release through which this mandatory settlement was effectuated. Both established blackletter law and sound policy reasons preclude such a destruction of rights.

### A. The Right To Opt Out Of A Class Action Seeking Money Damages Only Is Protected By The Fourteenth Amendment

Prior to the 1966 adoption by this Court of the present Rule 23 of the Federal Rules of Civil Procedure, individual claims at law involving common questions of fact or law, such as the adequacy of proxy statement disclosures under federal law -- were treated as "spurious" class actions, in contrast to "true" or "hybrid" class actions. See Supplementary Note of Advisory Committee Regarding 1966 Amendment to Rule 23, Annotations to Rule 23, 18 U.S.C.A.

In the case of spurious class actions, the rights of the holders of the individual claims not to become part of the class were recognized as a matter of course. Opting into the spurious class action, as opposed to opting out, was the order of the day.[17] See Newberg on Class Actions, § 16.15 at 16-80-16-83 (3d ed. 1992). Rule 23 in its present form was designed to facilitate settlements of spurious class actions by putting the onus on the individual holders of such claims to opt out. Id. The only way this obligation to opt out could constitutionally survive was to require notice to absentee members of the necessity to exercise this right to opt out or otherwise be automatically included in the proposed class. See Phillips Petroleum Co. v. Shutts, supra, 472 U.S. at 813-14. Stated differently, the notice to absent potential class members required by Rule 23(c)(2) was for the purpose of apprising them of their constitutional right to opt out.

As observed in Newberg on Class Actions (3rd Ed., 1992) § 8.04 at p. 8-15, "it is now established beyond doubt that Fourteenth Amendment considerations prompted the Rule 23(c)(2) mandatory notice section," citing Eisen v. Carlisle & Jacquelin,

---

[17] Even in the case of true or hybrid class actions, mandatory settlements have often not been imposed, depending upon the facts of the particular action. See 7B Charles A. Wright et al., Federal Practice and Procedure: Civil 2d § 1789, at 240 (2d ed. 1986).

417 U.S. at 173-75. With respect to the notice requirement of Rule 23(c)(2), this Court in Eisen stated: "Subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is, of course, subject." Id. at 173. The language of Rule 23(c)(2) compels this conclusion:

> "(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests. . . . " (emphasis added).

Most of the decisions discussing the application of this opt-out provision, including Eisen and Shutts, deal in terms of the absentee potential class members because they are the ones who might not be aware of the existence of the proposed opt-out class, and consequently are the ones needing notice of their right to opt out. It does not follow from this concern, however, that a class member who already knows of the proposed mandatory settlement destroying this opt-out loses his constitutional protection simply by opposing that destruction.

Yet under the rationale of the lower courts here, that is just what happens. This constitutional right becomes converted into an ephemeral one, vanishing completely once the class member goes into the court where the mandatory settlement is proposed and fights the denial of the opt out. By so doing, under the rationale of the lower courts, the individual no longer becomes an "absentee" member of the proposed class. Thus, to destroy this constitutional right all a court need do is approve a mandatory settlement of an action for money damages: those who object avail themselves of the "privilege" of litigating in the settling court. This rationale is an invitation for courts eager to clear their dockets to ignore constitutional rights and approve mandatory settlements of any class action for money damages only.

The right to opt out must be preserved because judicial scrutiny of the adequacy of class representation does not protect the individual's constitutional right to control his own cause of action. See Shutts, 472 U.S. at 807, 812. Not every plaintiff class seeking monetary damages is made up of claims that would not be economically viable in a different action. This case is a good example. Some could reasonably believe that a jury trial for damages under the 1934 Act holds a better prospect for adequate compensation than a claim for damages under Delaware law in the Delaware Chancery Court. Class members may also desire to control their own litigation due to concerns over possible conflicts between their interests and those of class counsel, especially at the settlement stage of the litigation. Wyatt v. Horsley, 793 F. Supp. 1053, 1055 (M.D. Ala. 1991). A class member may believe class counsel will favor one set of class members to the detriment of others. See, e.g., Franke v. Kroger Co., 649 F.2d 1216, 1226 (6th Cir. 1981), reh'g denied, 670 F. 2d 71 (6th Cir. 1982); Plummer v. Chemical Bank, 91 F.R.D. 434-42 (S.D.N.Y. 1981), aff'd, 668 F.2d 654 (2d Cir. 1982).

This case reveals precisely why that desire to control one's own property interest in one's cause of action is hardly irrational. It took the small settling plaintiffs and BellSouth only a weekend to reach a settlement agreement in principle. This alacrity can only be explained by the settling plaintiffs' desire to structure a deal whose primary beneficiaries were BellSouth and the attorneys for the settling plaintiffs. Unfortunately, this settlement all too well illustrates the danger that anyone:

> "who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. . . The attorneys' fees and prestige attendant upon probable appointment as class representative are the rewards for the attorney who bargains successfully with the defendants."

City of Detroit v. Grinnell Corp., 495 F.2d 448, 465 (2d Cir. 1974).

Thus, a judicial determination that the class was adequately represented does little to safeguard the interests of class members who, for whatever reason, would reject a proposed mandatory settlement. This practical limitation on the adequacy determination supports this Court's statement that adequate representation per se is not the "touchstone of due process." Eisen, supra at 176. To suggest that adequate representation by itself was sufficient for due process, would "prove too much" because it would lead to the conclusion that no notice at all was necessary once it was found that representation of the class was adequate. Id. at 176-77.

### B. The Inapplicability of The Full Faith & Credit Act

The court below relied on the Full Faith and Credit Act to justify enforcing the mandatory state court settlement, claiming it had to give preclusive effect to the Delaware court's determination that such a settlement was proper. This was error.

First, the Full Faith and Credit Act requires that preclusive effect be given only to those issues fully determined in a final judgment of a state court. Stated differently, the limits of the preclusive effect required by the Act are governed by the doctrine of collateral estoppel. See e.g., Allen v. McCurry, 449 U.S. 90 (1980); Hart & Wechsler's, The Federal Courts and Federal System pp. 1627-30 (3d Ed. 1940). For collateral estoppel to be applied, the issue sought to be given preclusive effect must have been fully and finally litigated. See Restatement of Judgments 2d, § 27 (1983); cases cited at p. 15, fn. 16, supra.

To rule, as did the District Court here and the Third Circuit in Grimes, that federal securities claims were "conclusively determined in the state court proceeding" (Grimes, 17 F.3d at 1562) is to ignore reality. So far as we know, there are no cases other than Grimes, the instant case and the Nottingham ruling in the First Circuit which hold that full faith and credit must be given to issuyes not fully and finally adjudicated.

Moreover, the release asserted as a bar in the District Court here was not adjudicated to be free of collusion and coercion. There was no determination regarding the validity of the state court release. Thus to argue that a federal court is required to accept the validity of a facially questionable release and grant summary judgment thereon without determining the underlying issues of fact relating to that affirmative defense is nothing short of remarkable.

Of equal importance, it is settled law that an unconstitutional state court judgment is not entitled to be given preclusive effect under the Full Faith and Credit Act. Federal courts are not powerless to determine whether or not there has been such a confiscation of property. This basic principle was set forth in Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907):

> "The constitutional requirement that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law."

See also, Kremer v. Chemical Construction Corp., 456 U.S. 461, 482-83, reh'g denied, 458 U.S. 1131(1982) ("other state and federal courts are not required to accord full faith credit to such [an unconstitutional] judgment.")

Finally, in purporting to give full faith and credit to the state court mandatory settlement on the basis of in personam jurisdiction over the Sandler plaintiffs, the lower courts simply ignored the class action aspects of the action. Both the Third Circuit and the District Court had a fiduciary duty to protect the

absentee class members. This duty is well established,[18] but is nowhere discussed in the District Court's opinion here or in the Third Circuit's opinion in Grimes. Neither court faced up to the obvious point that preservation of property rights for an entire class cannot constitutionally hinge on whether the class representatives prosecuting the federal securities claims in the federal court opposed the confiscation of those claims in the original state court proceedings. Indeed, those class members who objected to the original destruction of the opt-out, would, all other things being equal, probably be best equipped to challenge that denial in a subsequent proceeding, and that usually is in fact the case.[19]

To summarize, this Court should decide whether the right to opt out of a state court class action for money damages is a substantive one protected by the due process clause of the Fourteenth Amendment and whether the lower courts could properly resort to the Full Faith and Credit Act to refuse to rule on the constitutionality of the denial of the opt-out by the state court.

---

[18] E.g., Weinberger v. Kendrick, 698 F.2d 61, 69 n.10 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975); Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973).

[19] In re Colt Indus. Shareholder Litig., 566 N.E.2d 1160 (1991); In re Real Estate Title & Settlement Services Antitrust Litig., 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989); Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), cert. denied, 449 U.S. 1011 (1980); National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981); In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979).

### C. The Artifice Of Affixing A Rule 23(b)(1) Or (b)(2) Label To A Class Action Seeking Money Damages Only Should Not Empower A Court To Destroy Opt-Out Rights

In its Rules of the Court of Chancery, Delaware has adopted Rule 23, F.R.Civ.P. in haec verba. By its terms, the provisions of subdivision (c)(2) require giving an opportunity to any objecting class member to opt out of a (b)(3) action, i.e., an action for money damages only. This rule is mandatory: see p. 19 supra. If this provision had been followed by the Delaware state court, at least 25% -- the 3% of the outstanding MCCA shares held by the Sandler plaintiffs and the 22% by the other objecting shareholders -- and probably a good deal more, would have exercised their right to opt out. Thus, to make the settlement mandatory, the Delaware state court had to find a way to avoid the mandate of subdivision (c)(2).

One of the reasons prompting this Court to conclude it had granted certiorari improvidently in Ticor was that the question certified would not have presented a constitutional issue if the absent class members in that case had a right to opt out under Rule 23(b)(3). In dismissing the writ, this Court stated:

> "Such a right [to opt out under the Federal Rules] would exist if, in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not. See Rules 23(c)(2) and (c)(3)."

No such alternate ground exists here because the Delaware state court interpreted its Rule 23 analog to the Federal Rules as permitting a certification of an action for money damages only under Rule 23(b)(1) and/or (b)(2), and denied the right to opt-out to pursue this action for money damages only.

Thus, this case directly poses the question on which certiorari was granted in Ticor. As noted in In re Temple (Raymark Industries), 851 F.2d 1269, 1272-73 n.5 (5th Cir. 1988),

no appellate court has squarely faced the issue of whether there exists a right to opt out of a mandatory class action for money damages. This Court in Shutts suggested that the right to opt out cannot be denied in "class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments," regardless of whether the class is certified under Rule 23(b)(1), (b)(2) or (b)(3), 472 U.S. at 811 n.3.[20] This issue should now be settled expressly by this Court.

The ostensible rationales used by the Delaware state court for refusing to certify this action under subdivision (b)(3) and thereby avoiding the opt out required under subdivision (c)(2) highlight the constitutional issue. First, it ruled that denial of an opt out was needed to avoid "subject[ing] the defendants to threats of 'inconsistent adjudications . . . which would establish incompatible standards of conduct . . . .'" This rationale is at total odds with established law. See cases cited at p. 12, fn. 12, supra. Absent unusual circumstances, such as a limited fund, a class action for money damages requires granting an opt-out.[21]

The lack of validity of the other two reasons advanced by the Delaware Chancery Court, namely, that at the time of the

---

[20] The federal courts, recognizing that due process can require the opportunity to opt out, frequently exercise their authority under Rule 23(d) to provide that safeguard even for "mandatory" classes certified under (b)(1) or (b)(2), where claims for monetary damages are asserted in a context that more closely resembles a Rule 23 (b)(3) class action. See, e.g., Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979), Bogard v. Cook, 586 F.2d 399, 409 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979); Officers for Justice v. Civil Service Commission, 688 F.2d 615, 634-35 (9th Cir. 1982); Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).

[21] E.g., In re Real Estate Title & Settlement Services Antitrust Litig., 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989); In re Dennis Greenman Sec. Litig., 829 F.2d 1539 (11th Cir. 1987), reh'g denied, 840 F.2d 25 (11th Cir. 1988); Brown v. Ticor Title Ins., supra; Eisen v. Carlisle & Jacquelin, supra at 564.

settlement the state court action was still a shareholder's derivative suit and that the individual claims for money damages would, if proved, support the granting of equitable relief, have been discussed above. See pp. 12-13, supra. For the sake of guiding the judiciary in settlement of class action litigation, this Court should now make clear whether its ruling in Shutts regarding the right of objecting members to opt out of a class where the claims are "wholly or predominantly for money judgments" can be defeated and whether those who actually appear and object to the denial of the right to opt out lose their protection by so acting.

## II. The Destruction in The Mandatory State Court Settlement of Federal Subject Matter Claims at Law Presents Questions Under Both The Fifth and Seventh Amendments

The individual claims under the Securities Exchange Act of 1934 that were destroyed by the mandatory settlement in the state court were claims created solely under federal law and outside of the jurisdiction of that state court. The issues of fact presented by these federal subject matter claims -- whether the disclosure in the proxy statement was adequate and, if not, whether the misleading disclosure was material -- were issues that were triable before a federal jury, which was duly demanded in this case. This case thus presents the question whether the destruction of such claims in a mandatory state court settlement constitutes a denial of due process under the Fifth Amendment and a denial of the right to trial by jury under the Seventh Amendment.

Ordinarily, even a judgment in a fully contested action is open to collateral attack where the subject matter of the action was beyond the jurisdiction of the court rendering the judgment. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514-515 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1940); Restatement of Judgments 2d, § 12 (1983). A fortiori, state court approval of a settlement made before trial and over the objection of non-settling parties purporting to dispose of exclusively federal subject matter claims should not be accorded binding force in a subsequent federal suit. Id.

As the foregoing discussion reveals, there was nothing here which could conceivably justify denying members of the Delaware state class action the right to opt out of that state court settlement. On the other hand, the mandatory settlement imposed by that court wiped out valuable federal rights, both substantive and procedural. Whether a state court can do so is a question this Court should address. The violation of federal substantive rights here consisted of confiscation of causes of action under the federal securities laws which mandate full and complete disclosure in proxy statements for securities sold in interstate commerce. It is doubtful whether Congress in enacting the 1934 Securities Exchange Act intended to bestow on the Delaware Chancery Court the power to define the scope of the protection provided by that Act.

The violation of procedural constitutional rights here included the denial of the plaintiffs' right to have their federal causes of action tried in the federal court -- the exclusive forum for adjudicating these violations of federal law. In addition, the right to have them so tried by a federal jury is guaranteed by the Seventh Amendment.

The rationale used by the courts below for forfeiting these federal substantive and procedural rights was based upon two erroneous theories: 1) the misapplication of the Full Faith and Credit Act discussed above and 2) the proposition that because on occasion it may be proper for a court, as part of a settlement, to release claims over which it lacks subject matter jurisdiction, it therefore follows that it was proper for the Delaware state court to do so here. See Grimes, 17 F.3d at 1563-64. This is akin to arguing that because on occasion a building may be legally destroyed, arson is legal. It simply does not follow that because as part of the settlement of a class action a court may in unusual circumstances extinguish claims over which it has no jurisdiction, it can do so as a matter of course.

Oddly, Grimes, 17 F.3d at 1564, quotes Judge Friendly's opinion in National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 18 n.7 (2d Cir. 1981), to the effect "that 'a settlement could be properly framed so as to prevent class members from subsequently asserting claims, relying on a legal

theory different from that relied upon the class action complaint, but depending upon the same set of facts,'" and therefore concludes, without further analysis, that it was proper to do so in that case. But it does not follow that because the claim for non-disclosure under state law is based on the same set of facts as the ones arising under federal laws, a state court settlement as a matter of course can extinguish federal claims over which it has no jurisdiction. The danger of this is obvious: as pointed out above, the Delaware state court here used a caveat emptor disclosure rule that is antithetical to federal disclosure laws.

The reliance in Grimes on National Super Spuds for the per se rule it created is ironic. In National Super Spuds, a district court had settled a class action brought under both federal and state law, including those state claims subsequently asserted in a state court action, and denied the members of the state court class the right to opt out of its settlement. In reversing, Judge Friendly ruled:

> "If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." 660 F.2d at 18.

By granting this petition, this Court can and, we submit, should set forth the sort of circumstances, if any, which would authorize a state court to depart from the "ordinary" rule of not extinguishing claims over which it has no jurisdiction. Here, the resort by the Grimes and Sandler courts to a per se rule which simply rubber stamps mandatory state court settlements wiping out federal causes of action was done in the face of the following factors which forcefully militate against such an action:

- When settled, the original action in the Delaware state court was solely for money damages -- the merger having already been consummated. See Dofflemyer v. W.F. Hall Co., 558 F. Supp. 372 (D. Del. 1983).

- Federal courts have consistently certified class action claims under the federal securities laws for damages only.

- The claims destroyed here presented issues of fact which, if resolved in favor of the shareholders, were worth hundreds of millions of dollars and many multiples over the collusive settlement found to be "fair and adequate."

- A substantial number of MCCA shareholders, over 25% of the publicly held shares, had objected to the destruction of their federal claims.

- The state court settlement was found to be fair and adequate by resort to a disclosure standard -- caveat emptor -- directly antithetical to the federal securities laws.

- Triable issues of fact existed as to whether to release used as a vehicle for granting summary judgment on these federal claims was tainted by coercion and/or collusion.

Another factor militating against the departure from the ordinary rule postulated by Judge Friendly in National Super Spuds is the denial of the right to trial by jury of these federal causes of action guaranteed by the Seventh Amendment. Although this point was not explicitly raised below, the denial of this right is nevertheless a factor to be considered in determining whether the mandatory settlement destroying these federal subject matter claims was required to be given preclusive effect.

Here, issues of fact clearly existed for a resolution by a jury, both as to the adequacy of the disclosure under properly interpreted federal law and the validity of the release. Enforcement of the mandatory settlement necessarily included a denial of the right to trial of these issues by a federal jury. See cases cited supra, p. 4. In this connection, it should be noted that in the Dalkon Shield litigation, In re A.H. Robins Co., Inc., supra, involving literally thousands of claims, a certification was made under (b)(1). In doing so, however, the Fourth Circuit took pains to preserve the right for any claimant to choose a jury trial to resolve issues of individual causation and damages. In effect,

this properly gave individual claimants the right to opt out of the arbitration procedure set up in the Dalkon Shield litigation and exercise their Seventh Amendment rights to a trial by jury.

As noted above, however, this case does not present the extraordinary situation confronting the Fourth Circuit in the Dalkon Shield litigation. This was a typical federal securities class action, albeit for an immense amount of damage, and the Sandler plaintiffs should have been permitted to pursue it in federal court before a federal jury.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectully submitted,

DAVID F. DOBBINS
Counsel of Record
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 698-2500

SAUL, EWING, REMICK & SAUL
222 Delaware Avenue
Wilmington, Delaware 19899
(302) 421-6800

Attorneys for Petitioners

July 11, 1994

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 93- 7343

---

SANDLER ASSOCIATES, L.P.;
DANIEL R. MC CARTHY

V.

BELLSOUTH CORPORATION;
MOBILE COMMUNICATIONS
CORPORATION OF AMERICA;
BLS ACQUISITION CORP., I, INC.;
XAVIER W. NADY; JOHN N. PALMER;
C. VICTOR RAISER, II; THOMAS G. BARKSDALE;
R. FASER TRIPLETT, M.D.; E. LEE WALKER

Sandler Associates, L.P.; Daniel R. McCarthy
and all other similarly situated plaintiffs,

Appellants

---

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 89-00457)
District Judge: Hon. Joseph J. Longobardi

---

Argued November 10, 1993

Before: GREENBERG, COWEN and SEITZ, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDER that the judgment of the district court entered April 13, 1993, be and is hereby affirmed. See, Grimes v. Vitalink, No. 93-1268 (3d Cir. Mar. 9, 1994). Costs taxed against appellants.

ATTEST: By the Court,

/S/ /S/

P. Douglas Sisk, Clerk CIRCUIT JUDGE
Dated: APR 12, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| SANDLER ASSOCIATES, L.P. and DANIEL R. McCARTHY and all other similarly situated plaintiffs, | ) | Civil Action No. 89-457 LON |
| Plaintiffs, | ) | |
| v. | ) | |
| BELLSOUTH CORPORATION, MOBILE COMMUNICATIONS CORPORATION OF AMERICA, BLS ACQUISITION CORP. I, INC., XAVIER W. NADY, JOHN N. PALMER, C. VICTOR RAISER, II, THOMAS G. BARKSDALE, R. FASER TRIPLETT, M.D. and E. LEE WALKER, | ) | |
| Defendants. | ) | ORDER |

NOW, THEREFORE, for the reasons set forth in the Court's Opinion issued this date,

IT IS ORDERED that the Defendant's motion for summary judgment, Docket Item 40, is granted.

4/12/93 /S/

Joseph J. Longobardi, D.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| SANDLER ASSOCIATES, L.P. and DANIEL R. McCARTHY and all other similarly situated plaintiffs, | ) | Civil Action No. 89-457 LON |
| Plaintiffs, | ) | |
| v. | ) | |
| BELLSOUTH CORPORATION, MOBILE COMMUNICATIONS CORPORATION OF AMERICA, BLS ACQUISITION CORP. I, INC., XAVIER W. NADY, JOHN N. PALMER, C. VICTOR RAISER, II, THOMAS G. BARKSDALE, R. FASER TRIPLETT, M.D. and E. LEE WALKER, | ) | Apr.12 2:34PM '93 Clerk, U.S. District Court District of Delaware |
| Defendants. | ) | |

---

Mark Minuti, Esquire of Saul, Ewing, Remick & Saul, Wilmington, Delaware; David F. Dobbins, Esquire of Patterson, Belknap, Webb & Tyler, New York, New York; Attorneys for Plaintiffs.

Thomas R. Hunt, Jr., Esquire and Robert J. Valihura, Jr., Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Warren R. Stern, Esquire and Stephen R. Neuwirth, Esquire of Wachtell, Lipton, Rosen & Katz, New York, New York, Attorneys for Defendants BellSouth Corporation and Mobile Communications Corporation of America.

Jesse P. Finkelstein, Esquire of Richards, Layton & Finger,

Wilmington, Delaware; Kevin D. McDonald, Esquire and Thomas F. Cullen, Jr., Esquire of Jones, Day, Reavis & Pogue, Washington, D.C.; Attorneys for Defendants Xavier W. Nady, John N. Palmer, C. Victor Raiser, II, Thomas G. Barksdale, R. Faser Triplett, M.D. and E. Lee Walker.

---

OPINION

April 12, 1993
Wilmington, Delaware
LONGOBARDI, Chief Judge

This is a securities action in which the question before the Court is whether the Plaintiffs, Sandler Associates, L.P., Daniel R. McCarthy and all other similarly situated plaintiffs ("Plaintiffs" or the "Sandler Plaintiffs"), are barred by the doctrine of release from prosecuting the instant action by virtue of a class action settlement approved by the Court of Chancery for the State of Delaware.

## I. BACKGROUND

This action and the related action in the Court of Chancery arose out of a merger initiated in February 1988 and completed on April 4, 1989. In that merger the stock of Defendant Mobile Communications Corporation of America ("MCCA":) was acquired by a wholly-owned subsidiary of Defendant BellSouth Corporation ("BellSouth")[1] in exchange

---

[1] This wholly-owned subsidiary, BLS Acquisition Corp. I, Inc. ("BLS"), was named as a Defendant in the case sub judica. BLS, a Delaware corporation, was formed by BellSouth for the purpose of implementing the merger with MCCA. The corporate existence of BLS ended on April 4, 1989, the date on which the merger between BLS and MCCA was consummated, with MCCA surviving as a wholly-owned subsidiary of BellSouth. See BellSouth's Answer to Plaintiffs' Amended Complaint, Docket Item

for BellSouth stock worth approximately $710 million. MCCA's businesses consisted of, among other things, local and regional paging services, mobile telephone services, telephone answering services and cellular radio telephone operations.

The merger agreement provided, inter alia, that immediately prior to the merger, MCCA would distribute to its shareholders all of the stock of an MCCA subsidiary owning businesses that BellSouth would not acquire[2] and in the merger, each share of MCCA would be converted into shares of BellSouth stock worth $28.75. The merger agreement was contingent upon a number of conditions including receipt of regulatory and judicial approvals. At a special meeting of shareholders held on August 24, 1988, MCCA shareholders approved the merger agreement. A previously distributed proxy statement summarized the terms of the merger agreement and reprinted the agreement in its entirety.

In February 1989, after the fair market value of MCCA was alleged to have risen dramatically above the acquisition price established by the merger agreement and upon receipt of a letter from the instant Plaintiffs' counsel demanding that the merger agreement be terminated, BellSouth commenced an action against MCCA and Mtel in the Court of Chancery for the State of Delaware, seeking a declaratory judgment that the merger agreement was binding and enforceable and that no event that would permit termination had occurred. Several shareholders of MCCA (the "shareholder plaintiffs"), including the Sandler Plaintiffs, then commenced four separate actions in the Court of Chancery. Each shareholder action named the Defendants herein, MCCA, its directors and BellSouth, as

---

("D.I.") 27 at ¶ 12.

[2] MCCA's subsidiary was Mobile Telecommunications Technologies Corporation ("Mtel"). While MCCA became a wholly-owned subsidiary of BellSouth as a result of the subsequent merger, Mtel was "spun-off" to MCCA shareholders prior to the merger and retained its corporate existence independent of BellSouth.

defendants. Each action was purportedly brought on behalf of a class of consisting of all MCCA shareholders. MCCA and its directors responded by counterclaiming for a declaration that no event had occurred that would permit termination of the merger agreement. The shareholder and declaratory judgment actions were consolidated by the Court of Chancery. The relief sought by the shareholder plaintiffs included, inter alia, a preliminary injunction enjoining the defendants from closing the BellSouth/MCCA merger transaction.

The shareholder actions asserted that the alleged increase in the value of MCCA subsequent to the signing of the merger agreement justified MCCA's directors to abandon the merger and seek a superior acquisition offer for the company. They also alleged that the directors were authorized to terminate or rescind the merger under the terms of the merger agreement in spite of terms of the agreement which apparently indicated otherwise.[3] The shareholder contended,

---

[3] The shareholder plaintiffs relied on the provision of the merger agreement governing "Termination and Abandonment." Specifically, Section 9.01 provided that:

> This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, before or after the approval by the shareholders of [MCCA]:
>
> * * * *
>
> (f) By the Board of Directors of the Company [MCCA], if it, in the exercise of its good faith judgment, based upon the advice of counsel, determines that its fiduciary duties to the Company's shareholders require that it: (i) not recommend approval of this Agreement by the Company's shareholders, or that it withdraw such recommendation, or (ii) take an action specified in Section 6.01(e)(ii). . . .

however, that the merger agreement expressly permitted MCCA at any time (and thus required the board in the exercise of its good faith judgment as to its fiduciary duties to shareholders of MCCA based upon advice of counsel) to discuss any unsolicited acquisition proposals from third parties, to provide non-public information to such third parties and to enter into an agreement to merge with or be acquired by a third party. Based on these premises, the shareholders argued that the board was obligated to exercise their fiduciary duties to shareholders to abandon the merger.

In light of the merger agreement's express "no shop" provision and narrowly drawn termination clause, MCCA and its directors took the position that the merger agreement could be terminated only if MCCA received an unsolicited acquisition offer and the board then determined on the advice of counsel that it was required by its fiduciary duties to accept that offer. In response, the shareholder plaintiffs argued that if the MCCA directors were in fact not permitted to abandon the agreement, then the MCCA proxy statement soliciting shareholder approval of the merger was misleading because it

---

The "Effective Time" was defined as occurring after the closing of the merger, when the Certificate of Merger would be filed with the State of Delaware. Section 6.01(e)(ii) of the agreement referred to an action by MCCA to merge with, liquidate into or otherwise combine with any third party or enter into an agreement to do any of the foregoing. See Defendants' Affidavit and Exhibits ("Ex.") in support of Motion for Summary Judgment, D.I. 42, Ex.A. (Merger Agreement at §§ 9.01, 1.06 and 6.01, respectively).

Under the terms of the merger agreement, however, MCCA also agreed not to solicit or initiate discussions with any third party concerning a merger with MCCA or the acquisition of MCCA stock or assets. See id. at § 6.10.

Further, MCCA had agreed not to furnish any non-public information to third parties concerning a merger with MCCA or the acquisition of MCCA stock or assets. See id.

failed to disclose such an "interpretation."[4] The shareholder plaintiffs further contended that as a result of the false and misleading statements and omissions contained in the proxy statement, the majority of MCCA's shareholders were induced to, and did vote, to approve the merger agreement.

On March 24, 1989, the parties opened settlement negotiations with all of the shareholder plaintiffs participating in the discussions. These negotiations apparently were unsuccessful. Then, on March 29, 1989, the Court of Chancery denied the preliminary relief sought by the shareholder plaintiffs in the consolidated action. Upon consideration of the pleading, depositions and affidavits together with the briefs and oral arguments of the parties, Chancellor Allen observed that [t]his case, as refined by the presentation of counsel at oral argument, presents at this stage principally a question of the adequacy of the disclosure made

---

[4] The Sandler Plaintiffs subsequently amended their complaint in the Court of Chancery to so allege after the Court of Chancery denied the Shareholder plaintiffs' application for a preliminary injunction on March 29, 1989. The exact language of the disclosure in the proxy statement regarding the alleged broad "fiduciary out" provision follows:

Termination of the Merger Agreement

The Merger Agreement may be terminated and the Merger abandoned at any time prior to the Effective Time, whether before or after the approval by the stockholders of MCCA; . . . by MCCA if its Board of Directors, in the exercise of its good faith judgment, based upon the advice of counsel as to its fiduciary duties to the MCCA stockholders, determines to (i) withdraw its recommendation that the MCCA stockholders approve the Merger Agreement or (ii) merge with, liquidate into or otherwise combine with any third party or enter into an agreement to do any of the foregoing; provided that, in neither event, BellSouth shall have received $25 million in cash as a termination fee prior to such termination.

D.I. 42, Ex. A (Proxy Statement).

in the joint solicitation of proxies in connection with the MCCA shareholder approval of the Agreement." In re Mobile Communications Corp. Consol. Litig., Consol. Civ. A. No. 10627, slip op. at 2 (Del. Ch. Mar. 29, 1989) (Allen, C.) ("MCCA Consol. Litig. I"). As aptly summarized by the Court of Chancery in its later memorandum opinion certifying the class and approving the settlement,

> [t]he court declined to issue . . . an injunction, concluding, albeit preliminarily, that the merger agreement did not, in the circumstances, afford to MCCA a right to terminate the agreement and conclud[ed] also that the proxy materials accurately disclosed the narrow and technical matter that had come to plaintiffs to appear critically important.

In re Mobile Communications Corp. Consol. Litig., Civ. A. Nos. 10627, 10638, 10644, 10656 and 10697, slip op. at 2 (Del. Ch. Jan. 7, 1991) (Allen, C.) ("MCCA Consol. Litig. II") (citing MCCA Consol. Litig. I, aff'd without op., 608 A.2d 729 (Del.), cert. denied, 112 S. Ct. 3032 (1992).

In denying the injunction, the Chancellor held that, by reprinting and accurately summarizing the terms of the agreement, the proxy statement had fully and fairly disclosed those terms. The Chancellor found that, among other things, "none of the disclosures made to shareholders reflect[ed] an inaccurate statement concerning the scope or meaning" of the termination provision of the agreement; no relevant fact or conclusion had been omitted from the proxy statement; and the proxy statement could not be said to have contributed to a mistaken interpretation that the agreement granted the MCCA directors "a broad 'fiduciary out.'" MCCA Consol. Litig. I, slip op. at 2-6.

On March 30, settlement negotiations recommenced. This time, however, neither the Sandler Plaintiffs nor other plaintiffs represented by the same counsel chose to participate. An agreement in principle to settle the consolidated action was

reached on April 1, 1989. The settlement agreement, conditioned upon Court of Chancery approval pursuant to Delaware Chancery Rule ("Chancery Rule") 23(e), provided that, in consideration of a release from any liability to the class, the defendants would increase the value to the individual MCCA shareholders by (1) increasing the number of BellSouth shares to be received by each MCCA shareholder in the merger, (2) timing the merger so that the MCCA shareholders would receive the cash dividend declared by BellSouth for the first quarter of 1989 and (3) increasing the capital of Mtel, which was to be "spun-off" and whose stock was to be distributed to the MCCA shareholders immediately prior to the merger. The Court of Chancery found that the value of these benefits approximated $35 million.

The Sandler Plaintiffs, together with the other plaintiffs represented by the same counsel, refused to agree to the settlement or to participate in the final round of settlement discussions. They instead applied for leave to appeal to the Supreme Court of Delaware from the denial of the preliminary injunction motion and for an injunction staying the merger pending that appeal. In denying the application and refusing to certify an interlocutory appeal, Chancellor Allen candidly proffered an evaluation of the strengths of the central claims asserted in the consolidated shareholder action, stating that:

> "Frankly, I found that the case presented last week was one of the weakest cases legally for the issuance of a preliminary injunction that I have ever encountered in the court.
>
> * * * *
>
> Well, with respect to that aspect of the claim, the probability of success, I have already been as candid as I can be, and more candid than the plaintiffs would care for me to be in telling you that I don't think there is much to this case legally once you get past the practical fact that the plaintiffs may feel that there is

> more money out there if somebody would just be free to go and look for it."

MCCA Consol. Litig. II, slip op. at 3 (citing Transcript of April 3, 1989 hearing). On April 4, 1989, the Delaware Supreme Court denied the application for an interlocutory appeal. BellSouth having obtained the necessary regulatory approvals in the interim, the merger was accomplished the same day with MCCA "spinning-off" Mtel and completing the distribution of Mtel shares to its shareholders and then merging with a subsidiary of BellSouth.

On June 6, 1989, a stipulation of settlement was executed by MCCA, BellSouth and the settling shareholder plaintiffs. At that time,the settling parties moved for an order under Chancery Rule 23(e) approving the settlement on behalf of a class certified under Chancery Rules 23(b)(1) and 23(b)(2) (which are materially equivalent to Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2)), and directing that notice of a hearing on the settlement be provided to the proposed class. Included in the class were all persons who held Class A or Class B common stock of MCCA as of July 20, 1988 and their successors in interest or transferee, other than the defendants. The Sandler Plaintiffs demanded that the settlement be summarily rejected and that they and the other plaintiffs represented by their counsel be appointed class representatives. On August 14, 1989, the Court of Chancery rejected these demands, scheduled a hearing on the settlement and directed that notice be given to the class. The Chancellor granted to the Sandler Plaintiffs the right to conduct discovery concerning the settlement and to include a statement of reasons for their objections to the settlement in the hearing notice. See D.I. 42, Ex. N. Nine days later, the Sandler Plaintiffs commenced the instant action in federal court.

The class on whose behalf the Sandler Plaintiffs purport to bring this federal action under Federal Rules of Civil Procedure 23(a) and 23(b)(3) consists of all persons who held the common stock of MCCA prior to April 4, 1989, the

effective date of the BellSouth/MCCA merger, other than the Defendants. Plaintiff Sandler Associates, L.P. is an investment limited partnership which was the holder of in excess of 718,500 Class A and Class B shares of MCCA common stock during the purported class period. These shares represented over three percent of the outstanding shares of MCCA. Plaintiff Daniel R. McCarthy was the holder of in excess of 11,000 Class A and Class B shares of common stock of MCCA. To date, the Court has not entered a class certification pursuant to Federal Rule of Civil Procedure 23(c)(1), pending the resolution of the Defendants' motion for summary judgment.

In the instant action, the Sandler Plaintiffs allege that the Defendants procured MCCA shareholder approval of the merger on the basis of a false and misleading proxy statement which led the shareholders to believe that MCCA had broad rights at any time prior to or after the shareholder approval to terminate the merger agreement in the best interests of the MCCA shareholders. Plaintiffs allege that in denying the MCCA shareholders the value of their company, the defendants violated the federal securities laws, breached their fiduciary duties at common law and committed common law fraud. [5]

---

[5] Count I of the amended complaint alleges violations of section 10(b) of the Securities Exchange Act of 1934 (the "Securities Exchange Act"), 15 U.S.C.§ 78 j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Count II alleges violations of section 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77q(a). Count III alleges violations of section 11 of the Securities Act, 15 U.S.C. § 77k. Count IV alleges violations of section 12(2) of the Securities Act, 15 U.S.C. § 77(2). Count V alleges violations of section 15 of the Securities Act, 15 U.S.C. § 770, and section 20 of the Securities Exchange Act, 15 U.S.C. § 78t. Count VI alleges violations of 18 U.S.C. § 1962 (a) - (d) (Racketeer Influenced and Corrupt Organizations Act) ("RICO"). Count VII alleges breach of fiduciary duty by MCCA's board of directors. Count VIII alleges common law intentional and negligent misrepresentation. Count IX alleges violations of section 14(a) of

Essentially, the complaint repeated the allegations about the MCCA proxy statement that had previously been made in the Court of Chancery, but framed the allegations as purported violations of the federal securities laws. The complaint also repeated the allegations that the MCCA directors had breached their fiduciary duties in completing the merger and in agreeing to settle the shareholder litigation. Moreover, the complaint framed RICO fraud and conspiracy allegations based on the same claims and sought treble damages.[6]

While seeking to move litigation of their claims to federal court, the Sandler Plaintiffs continued to pursue their claims in the related proceedings in the Court of Chancery, including vigorous discovery related to the proposed settlement. Pursuant to an order of the Chancery Court dated December 5, 1989, notice of the proposed settlement was sent

---

the Securities Exchange Act, 15 U.S.C. § 78n(a), and Rules 14a-5 and 14a-9 promulgated thereunder, 17 C.F.R. §§ 240.14a-5 and 240.14a-9.

[6] Specifically, the complaint alleges, among other things: (1) that the MCCA directors breached their fiduciary duties in consummating the merger and authorizing MCCA to agree to the settlement, (2) that the Defendants violated the federal securities laws and the common law by disseminating the proxy statement, which allegedly failed to disclose an alleged "position" of the Defendants with respect to the meaning of the termination provision of the merger agreement (i.e., that under MCCA's interpretation of the merger agreement and under the then current circumstances, there was no provision which would permit MCCA to terminate the merger agreement), and by filing with the Securities and Exchange Commission in November 1988 a registration statement for the securities of Mtel that was allegedly false and misleading in failing to state that MCCA would transfer additional assets to Mtel prior to the "spin-off" and (3) that the Defendants' conduct in connection with the merger violated RICO. The complaint seeks, inter alia, compensatory damages of "at least $850,000,000," treble damages under RICO of "at least $2.55 billion" and punitive damages.

to all class members. D.I. 42, Ex. P. The notice included a statement on behalf of the objecting plaintiffs, including Plaintiffs herein, explaining their opposition to the proposed settlement as inadequate. The Sandler Plaintiffs submitted briefs and presented oral argument at the settlement hearing on January 18, 1990. In opposing the settlement, they conceded that their claims in the instant action were included within the scope of the release under the proposed settlement, and indeed, made that the central premise of their opposition. See id.[7]

On January 7, 1991 in MCCA Consol. Litig. II, Chancellor Allen ruled that the consolidated shareholder action was properly maintained as a class action under Chancery Rules 23(b)(1) and 23(b)(2) and that the settlement was fair and reasonable to the class (with one modification not here relevant). In evaluating whether to approve the proposed class settlement, Chancellor Allen considered all claims that were or could have been asserted by the class, including claims arising under federal law. He rejected the arguments of the Sandler Plaintiffs that the settlement was not reached in good faith, that due process required that class members be given the right to opt out and that a state court could not approve a release unless the release excluded federal claims.

Significantly, Chancellor Allen observed that the approval of the proposed settlement under Chancery Rule 23(a) operated to release all related class claims currently pending in the instant federal action. In effect, the settled claims included all claims that related in any way to the merger.[8] In the

---

[7] In fact, in the amended complaint in the case sub judica, the Sandler Plaintiffs concede that the settlement was conditioned upon the Delaware Chancery Court's dismissing any and all claims, including those asserted in this case, arising out of or in any way connected with the sale of MCCA to BellSouth. See D.I. 26 at ¶ 90.

[8] The stipulation of settlement contained the following release clause:

---

. . . IT IS STIPULATED AND AGREED, by and among the parties to this Stipulation, by their attorneys, subject to the approval of the Court of Chancery, in consideration of the substantial benefits that the members of the Class . . . have received and will receive from the Settlement, that all claims arising from the beginning of the world up to and including the date of this Stipulation, whether known or unknown, including but not limited to claims for breach of fiduciary duty and/or fraud, that have been or could have been asserted by any member of the Class . . . , against any of the defendants, or any of their respective present or former officers, directors, agents, employees, attorneys, advisers (including Prudential-Bache Securities Inc. and Morgan Stanley & Co. Incorporated), . . . (defendants and all) such other persons and entities being referred to herein as the "Released Parties") in connection with or that may have arisen or hereafter may arise out of or relate in any way to (1) the Shareholder Actions; (2) any discussions or negotiations, whether or not leading to an agreement, concerning the possible acquisition of MCCA, or any portion of the assets or stock of MCCA; (3) the Merger Agreement; (4) the Merger; (5) the Proxy Statement; (6) the Special Meeting; (7) the Spin-Off; (8) the Information Statement; (9) any statements, representations, actions and/or decisions not to act or failures to act made or taken by MCCA or the members of the Board of Directors of MCCA or BellSouth or the Board of Directors of BellSouth, either individually or collectively, in connection with the possible purchase or sale of MCCA or any portion of the assets or stock of MCCA; (10) this Settlement (except for compliance with the Settlement; and/or (11) any matters, transactions, occurrences or omissions referred to in the complaints in the Shareholder Actions or the Stipulation (all of which are defined as the "Settled Claims"), shall be compromised, settled, released, discharged and dismissed with prejudice, upon and subject to the following terms and conditions:

* * *

4. The obligations of defendants under this

words of Chancellor Allen, "[t]his agreement would release defendants from all claims that might be asserted in connection with the negotiation or effectuation of the merger." MCCA Consol. Litig. II, slip op. at 11. The Chancellor further stated that

> [a]pproval by this court of the Stipulation of Settlement would entail the dismissal with prejudice of the claims asserted and the release of all other claims arising from the facts alleged. Although the federal court is, of course, free to determine whether the release in question would be given a preclusive effect on the federal claims, see Kramer v. Chemical Constr. Corp., 456 U.S. 461, 481-83 (1982), I assume for purposes of this analysis that approval of the Stipulation of Settlement's release of the federal claims wold result in dismissal of the federal claims as well. See Nottingham Partners v. Trans-Lux Corp., C.A. No. 88-0591-Z, 1990 U.S. Dist. LEXIS 8078 (D. Mass. June 27, 1990).

Id. at 13. This Court agrees that the affect of the settlement and release on the Sandler Plaintiffs' federal litigation is ultimately for this Court to decide. See, e.g., Nottingham

---

> Stipulation shall be in full settlement, compromise, release and discharge of the Settled Claims, and no Released Party shall have any other or further liability or obligations to anyone with respect to the Settled Claims except as expressly provided for herein. . . .
>
> D.I. 42, Ex. R (emphasis added)

> The "Class" comprised all holders (other than defendants in the shareholder actions) of MCCA Class A or Class B common stock as of the close of business on July 20, 1988 and their successors in interest or transferees, immediate and remote. See D.I. 42, EX. Q.

Partners v. Trans-Lux Corp., 925 F.2d 29, 33-334 n.4 (1st Cir. 1991).

On February 6, 1991, Chancellor Allen entered an order and final judgment that (1) certified the shareholder action as a class action under Chancery Rules 23(b)(1) and 23(b)(2), (2) approved the settlement of the action as "fair, reasonable and adequate," (3) dismissed the action "on the merits as to all defendants and with prejudice as against plaintiffs in the Shareholder Actions and all members of the certified class" and (4) directed that the obligations undertaken by the defendants in the settlement "shall be in full settlement, compromise, release and discharge of the Settled Claims, and no Released Party . . . shall have any other or further liability or obligations to anyone with respect to the Settled Claims" except for the obligations in settlement. See D.I. 42, EX. Q.

On February 4, 1992, the Supreme Court of Delaware affirmed Chancellor Allen's February 6, 1991 order and final judgment for the reasons set forth by the Court of Chancery in its January 7, 1991 decision. See D.I. 42, EX. S. On June 29, 1992, the Supreme Court of the United States denied a petition by the Plaintiffs for a writ of certiorari. See D.I. 42, EX. T. Shortly thereafter, Defendants filed the instant motion for summary judgment.

Defendants move for summary judgment on three grounds: (1) that the action should be dismissed because the Plaintiffs' claims have been released, (2) that Counts II through VIII of the amended complaint should be dismissed on the ground of res judicata[9] and (3) that the amended complaint

---

[9] Count I and IX allege violations of the Securities Exchange Act, that is, claims exclusively within the jurisdiction of the federal courts. See 15 U.S.C. § 78aa. On the other hand, Counts II though VIII allege Securities Act and RICO violations, as well as state law claims. State courts have concurrent jurisdiction over Securities Act claims. See 15 U.S.C. § 77v(a). Civil RICO claims are subject to the concurrent jurisdiction of the state and federal courts. See

should be dismissed because it fails to state a claim upon which relief can be granted.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) when the moving party establishes that there is no genuine issue of material fact that can be resolved at trial and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Materiality is determined by the substantive law that governs the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this inquiry, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. A dispute is "genuine" only if a reasonable jury could return a verdict for the nonmoving party. Id. Following a determination that no genuine dispute of material facts exists, the moving party must demonstrate that it is entitled to judgment as a matter of law.

Any doubts as to the existence of genuine issues of fact will be resolved against the moving party and all inferences to be drawn from the material it submits will be viewed in the light most favorable to the party opposing the motion. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1231 (D. Del. 1986) (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970)), aff'd, 822 F.2d 388 (3d Cir. 1987). If the evidentiary record supports a reasonable inference that the ultimate facts may be drawn in favor of the responding party, then the moving party cannot obtain summary judgment. In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 258 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

---

Tafflin v. Levitt, 493 U.S. 455, 460 (1990); McCarter v. Mitchen, 883 F.2d 196, 200-201 (3d Cir. 1989).

Regardless of how the Plaintiffs attempt to cast the present dispute, it centers primarily on a matter of law, that is, the Court is called upon to decide as a matter of law whether the release approved by the Court of Chancery for the State of Delaware in the related consolidated state action bars the Sandler Plaintiffs from prosecuting the instant action. Accordingly, if the Court determines that the release operates to preclude this lawsuit, such a conclusion mandates the finding of the absence of any genuine issues of material fact and summary judgment must be granted in favor of the Defendnats. In such a situation, the second and third grounds for the motion for summary judgment would be considered moot.

## III. DISCUSSION

At the outset, it is clear that the settlement approved by the Court of Chancery for the State of Delaware embraces all of the claims asserted in this federal action.[10] The Sandler Plaintiffs are members of the certified state court class and each of their claims relates to the merger between Bellsouth and MCCA. Specifically, their securities law claims concern the proxy statement and their state law claims for breach of fiduciary duty and common law intentional or negligent misrepresentation concern the merger, the proxy statement and related matters.[11] The issue to be decided, therefore, is the effect of this release on the instant federal litigation.

---

[10] For the text of the release, see supra note 8.

[11] To the extent that the Plaintiffs now seek to assert claims in this action purportedly arising from the agreement to settle the Chancery Court actions, such claims also fall plainly within the scope of the release approved by the Chancery Court.

While the issue presently confronting the Court appears to be a question of first impression in the Third Circuit, the Court of Appeals for the First Circuit has addressed a substantially identical question in a case involving a class action settlement and release approved by the Delaware Court of Chancery in Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991). The Court finds the Nottingham decision persuasive and is guided by it in resolving the instant motion.

The facts that follow were gathered from the First Circuit's opinion and the district court's decision in Nottingham Partners v. Trans-Lux Corp., Civ. A. No. 88-0591-Z, 1990 U.S. Dist. LEXIS 8078 (D. Mass. June 27, 1990). In Nottingham, the plaintiffs ("Nottingham") brought an action in federal district court alleging violations under section 14 of the Securities Exchange Act, 15 U.S.C. § 78n, and Rule 14a-9 promulgated thereunder, alleging that the defendants, Trans-Lux Corporation ("Trans-Lux") and its directors, failed to disclose important information in a proxy statement. The plaintiffs also brought state common law breach of fiduciary duty and statutory claims arising out of the same transactions and proxy statement. The federal suit sought money damages as well as equitable redress. Precipitating this lawsuit and the state action which followed was Trans-Lux's issuance of a proxy statement soliciting votes on a recapitalization plan and various amendments to its certificate of incorporation.

Approximately two weeks after the federal action was instituted, a Trans-Lux shareholder filed an individual, class and derivative action in Delaware Chancery Court alleging violations of state law related to inter alia, disclosures in the proxy statement. Subsequently, the parties in the state litigation entered into a settlement agreement. After notice of the proposed settlement to all prospective class members, including the plaintiffs in the federal action, the Court of Chancery held a hearing to determine whether to approve the proposed settlement. Nottingham appeared at the hearing and objected vehemently to the proposed settlement. The

Chancery Court rejected Nottingham's objections and approved the settlement, including the general release contained therein. The court also certified the state case as a class action under Chancery Rule 23(b)(2) and denied Nottingham the opportunity to opt out of the class.

Upon appeal by Nottingham, the Delaware Supreme Court upheld the Chancery Court decision in all respects. See Nottingham Partners v. Dana, 564 A.2d 1089 (Del. 1989). The decision of that court was aptly summarized by the First Circuit, as follows:

> "The court held in substance that (1) inasmuch as [the state shareholder] action was primarily equitable in nature, class certification was available despite the 'incidental' claim for monetary relief, id. at 1094-97; (2) [Nottingham was] lawfully denied egress from the class, id. at 1097-1101; (3) the class settlement was, as the vice chancellor had found, fair, reasonable and adequate, id. at 1101-04; and (4) because [Nottingham's] federal law claims arose out of the same nucleus of operative fact as the claims prosecuted in [the state shareholder action], the vice chancellor possessed, and appropriately exercised, the power to approve a release that included those claims within its ambit, id. at 1105-07. Lack of jurisdictional competency -- the fact that a Delaware state court could not have gained subject matter jurisdiction over [Nottingham's] federal securities law claims -- did not bar the inclusion of those claims within the sweep of the release. Id. at 1104-05."

Nottingham, 925 F.2d at 31.

After this parade of intervening events, the defendants in the federal action moved for summary judgment on the ground that the claims in that action were released as a result of the settlement in the class action brought in Delaware Chancery Court. The United States District Court for the

District of Massachusetts ruled that the defendants were entitled to summary judgment because Nottingham's claims were extinguished at the time the shareholders' class action was resolved in the Delaware courts. Nottingham, 925 F.2d at 30. The First Circuit affirmed. Id.

Turning to the case sub judica, it is well settled that a suit can be barred by the earlier settlement of another suit in either of two ways, i.e., by the separate and distinct defenses of release or res judicata. See id. at 31-32 (citations omitted). This proposition is equally applicable to a court-approved class action settlement. See id. at 32. If the release defense operates to bar the federal action in its entirety, the Court need not resolve the res judicata defense.

As in Nottingham, the Delaware Chancery Court explicitly found that the claims asserted here arose out of the same transactions as the claims in the related Delaware consolidated action. This Court identically concludes that the federal action shares a common gravamen with the related Delaware consolidated action and all counts of the Plaintiffs' amended complaint arise out of the same acts and transactions that were at issue in the Court of Chancery actions.

In the instant case, as in Nottingham, the Delaware Court of Chancery approved a settlement releasing all claims relating to a proxy statement, including federal securities law claims which are within the exclusive jurisdiction of the federal courts. The question that is posed is whether this Court will find the release valid and effective and dismiss the federal claims. When called upon to resolve this question, federal courts have uniformly dismissed claims, including claims committed to their exclusive jurisdiction, that have been released in settlement of class actions brought in state courts. See, e.g., Nottingham, 925 F.2d at 33-34; TBX Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982); In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221 (5th Cir. 1981); In re Washington Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379, 1413 (D. Ariz. 1989), aff'd sub nom.

Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir.), cert. denied, 113 S. Ct. 408 (1992); Bernstein v. Mediobanca Banca di Credito Finanziario-Societa Per Azioni, 78 F.R.D. 1, 2 (S.D.N.Y. 1978). See also Lowenschuss v. Resorts Int'l. Inc., Civ. A. No. 89-1071, 1989 U.S. Dist. LEXIS 7407, at *20 & n.15 (E.D. Pa. June 29, 1989) ("this [state court settlement] release, by its plain language, bars suits in federal court, including those based upon claims within the federal court's exclusive jurisdictions"); 18 Charles A. Wright et al., Federal Practice and Procedure § 4470 at 688-89 (1981) ("[a]part from claim preclusion as such, settlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims"].

Indeed, in Nottingham, in affirming the lower court's dismissal of the federal action on the ground of release, the First Circuit observed that "[s]ince the federal securities claims [i.e., Securities Exchange Act claims,] could only be litigated in a federal court, see 15 U.S.C. § 78aa, appellants hypothesize that those claims, come what may, could not be barred by a state court settlement. We consider this argument to be jejune." Nottingham, 925 F.2d at 33. Based on the weight of authority, this Court concludes that the Chancery Court appropriately exercised its power to approve a release encompassing federal securities law claims under the Securities Exchange Act which were not within the subject matter jurisdiction of the Delaware state courts.

In considering the effect of the release on the federal litigation, the Court is guided by the teachings of Nottingham, supra. There, the court explained that

> [t]he release contained in the [state court] settlement, by its terms, met all the criteria necessary to engage the gears of the release defense for purposes of this suit: it (1) applied to appellants, (2) encompassed the claims asserted [in the federal action], and (3) was legally enforceable. . . . [F]urther prosecution of

> appellants' federal suit is foreclosed by the release defenses.
>
> * * * *
>
> Once the class action court, affording the process that is due, determines that an objecting party will not be allowed to opt out of a Rule 23(b)(2) class, the objector becomes subject to a resulting settlement, including any release granted therein, to the same extent as any designated class representative or consenting class member.

Id. at 32. The facts of the case sub judica fall squarely within Nottingham's parameters for a successful release defense by virtue of the class action settlement and release approved and ordered by the Delaware Chancery Court. The claims asserted in this action are encompassed within the state court release and have been released on behalf of a class that indisputably includes the Plaintiffs. Moreover, the release was approved by the Delaware state courts only after notice and full consideration of the Plaintiffs' objections to the settlement and release.

The Court additionally is motivated to conclude that the state court-approved release forecloses this federal action based on principles of comity between state and federal courts. To deny effect of a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences. Such a doctrine would unjustifiably proliferate litigation, defeat legitimate expectations of the settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefits of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts.

The circumstances of this case make adherence to the settled rules of release particularly appropriate. Here, the

Plaintiffs are not only members of the class, but themselves chose to commence the state court class actions in which the release was given and judicially approved. They commenced the federal action only after the Court of Chancery refused to appoint them as class representatives and directed that a hearing be held to consider a settlement proposed by other class action plaintiffs. Even after commencing this action, they chose to continue to litigate their objections to the settlement in the Delaware state courts. The Sandler Plaintiffs were in no sense "absentee" class members.

Indeed, the Plaintiffs were given, and vigorously exercised, a constitutionally adequate opportunity to be heard in the Delaware state courts. See, e.g., Nottingham, 925 F.2d at 32. Like the Plaintiffs in Nottingham, the Sandler Plaintiffs litigated and lost on the issues which they now contest in their opposition to the Defendants' motion for summary judgment: that the consolidated shareholder action was improperly maintained as a class action under Chancery Rules 23(b)(1) and 23(b)(2), that the settlement was woefully inadequate, that the settlement was not reached in good faith, that a state court could not approve a release unless the release excluded federal claims not within the state courts' jurisdiction and that due process required that class members be given the right to opt out. The Plaintiffs thus became collaterally estopped from relitigating these issues and the defense of release is fully applicable to their claims in this action. See, e.g., Nottingham, 925 F.2d at 32 (plaintiffs were "collaterally estopped from arguing here, contrary to what the Delaware courts found that they are outside the terms of the decree or that the settlement was unfair or inadequate").

The Court rejects the Plaintiffs' argument that a question of fact exists as to whether the settlement upon which the release was based is facially collusive or the result of coercion. In an attempt to raise a factual issue about coercion, the Plaintiffs rely entirely on the deposition testimony of the chairman of MCCA's board of directors concerning, inter alia, the settlement. This attempt to inject the specto

dispute regarding the settlement is unavailing, however, because no inference of coercion or collusion is present in that deposition testimony. (The Court need not speculate at this point what effect that would have if such an inference had been found.) The Plaintiffs additionally assert that they were not permitted full and adequate discovery on these issues and thus, the existence of coercion is an issue of fact which must be resolved in their favor on the present motion for summary judgment. To the contrary, the record conclusively demonstrates that the Plaintiffs had ample opportunity to contest the issue of whether the settlement was fair and reached in good faith. Moreover, the record emphatically belies the Plaintiffs' contention that they were prevented from conducting discovery on the issue of coercion. In the Delaware court, the Plaintiffs launched an extensive attack on the conduct of the settling parties as part of their overall attack on the fairness of the settlement. See, e.g., MCCA Consol. Litig. II, slip op. at 24-33.[12] Cf. 18 Charles A. Wright et al., Federal Practice and Procedure § 4470 at 688-89 (1981) ("[s]tate court determinations that the settlements [of state court litigation] were fair, indeed, have been held to preclude relitigation of the fairness issue[;] . . . [t]hese rulings are surely correct").

---

[12] The Plaintiffs' own reliance on their December 20, 1989 deposition of MCCA's former CEO and board chairman, John N. Palmer ("Palmer"), to establish the inference of coercion belies their purported lack of discovery on the coercion issue. This deposition represented the second time that Palmer was deposed by the Plaintiffs in the state court action. Plaintiffs themselves supplied the deposition transcript in opposing the Defendants' instant motion for summary judgment. See, D.I. 45, EX. HH. Throughout the deposition, Plaintiffs' counsel repeatedly asked Defendant Palmer about pressures brought to bear by BellSouth on MCCA to close the merger deal and settle with the shareholder plaintiffs in the state court action. The Court finds, however, that nothing contained therein raises a genuine issue of material fact as to whether MCCA was "coerced" into settling the shareholder actions. The record is simply devoid of inferences of coercion.

The Court likewise rejects the Plaintiffs' argument that it was a denial of due process to prohibit the Plaintiffs from opting out of the certified class and pursing their exclusive federal damages claims. The Plaintiffs' reliance on Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985), in support of their argument is misplaced. Unlike the absent class members in Shutts, the Sandler Plaintiffs were parties to and actively participated in the consolidated class action in Chancery Court throughout the proceedings and consented to the Chancery Court's jurisdiction by filing their class action suit there. "Shutts mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff." In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992) (citing Shutts, 472 U.S. at 811-12) (emphasis added), cert. dismissed, 113 S. Ct. 1070 (1993). Thus, the narrow holding of Shutts has no direct application with respect to these Plaintiffs.

Essentially, the Plaintiffs press the opt out argument in an attempt to have this Court review the propriety of the class certification and their inclusion in the class. As with their other arguments, Plaintiffs again cannot prevail. "[A] court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed." Nottingham, 925 F.2d at 33 (citations omitted). Like Nottingham, here, "[t]he Delaware courts, affording all the prophylaxis which the Due Process Clause commands, adjudicated the question of whether [the Sandler Plaintiffs] had a right, or should have been allowed, to opt out of the settlement." Id. In objecting to the class certification and settlement, the Plaintiffs were given, and vigorously exercised, a constitutionally adequate opportunity to be heard on this issue.

## IV. CONCLUSION

For the reasons stated herein, the Court grants the Defendants' motion for summary judgment because the action is barred by a settlement and releases approved by the Court of Chancery for the State of Delaware in the related consolidated class action.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

SANDLER ASSOCIATES, ET AL., )
)
Plaintiffs, )

Civil Action No.
89-457 LON

)
vs. )
)
BELLSOUTH CORPORATION, et al, )
)
Defendants. )

ORDER

1. Defendants' have filed a Motion for Summary Judgment based upon release, res judicata and failure to state a claim founded upon on the settlement and release entered by the Delaware Chancery Court in In re Mobile Communications Corporation of America, Inc. Consolidated Litigation and affirmed by the Supreme Court of Delaware. Docket Item ("D.I.") 40, 41. In anticipation of the filing of this motion, Plaintiffs' requested that the Court allow "discovery into the [issue of] coercion by BellSouth" for the purpose of responding to Defendants' Motion for Summary Judgment. D.I. 43. Defendants have filed their response to Plaintiffs' request, D.I. 44, and Plaintiffs have filed a rebuttal. D.I. 45.

2. Plaintiffs assert that "preclusive effect cannot be given [to the judgment of the Supreme Court

of Delaware] without assessing the reasonableness of the settlement becasue the settlement was the result of improper duress and the state court denied plaintiffs a 'constitutionally adequeate opportunity' to develop and present any evidence in this regard." D.I. 43. According to Plaintiffs, "fairness requires that this Court permit discovery." D.I. 43.

3. Plaintiffs' own argument, however, belies their claim that discovery is required in the instant situatin. Plaintiffs contend that "[i]t would be neither fair [n]or accurate to suggesst that an adequate record existed on which the state court could make a fair assesment of the circumstances underlying the settlement." D.I. 43. Plainitffs' contention leads to the conclusion that the Court must look to the state court record to determine whether the state court had an adequate basis upon which to support its decision. This is consistent with Defendants' argument that whether "the state proceeding [was] constitutionally flased" can only be determiend by reference to the state court record. D.I. 44.

4. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) (citations omitted). A federal court, however, can refuse to accord preclusive effect if it determins that due process would be violated. Id. (citing Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). To avoid claim or issue preclsuion, plaintiffs must show that they did not have a full and fair opportunity to litigate their claims or issues. Id.

5. Whether the Court is required to give Full Faith and Credit to the Delaware state court judgment

thus depends entirely on what occurred inthe state court. Therefore, the state court record is all the Court needs to decide Defendants' Motion for Summary Judgment.

NOW, THERREFORE, IT IS ORDERED that:

1. Plaintiffs' request for discovery, D.I. 43, is denied.

2. Defendants' Motion for a Protective Order staying discovery, D.I. 37,[1] is hereby granted pending disposition of Defendants' Motion for Summary Judgment.

8/3/92

/S/
Joseph J. Longobardi, D.J.

---

[1] By order dated July 24, 1992, D.I. 39, the Court granted Defendatns' Motion for a Protective Order pending disposition of Plaintiffs' discovery request related to Defenadants Motion for Summary Judgment. The instant order extends the time period during which the protective order shall be in effect.

DISTRICT OF DELAWARE

---

SANDLER ASSOCIATES, L.P. and DANIEL R. McCARTHY, on behalf of themselves and all other similarly situated plaintiffs,

Plaintiffs,

v.

BELLSOUTH CORPORATION, MOBILE COMMUNICATIONS CORPORATION OF AMERICA, BLS ACQUISITION CORP. I, INC. XAVIER W. NADY, JOHN N. PALMER, C. VICTOR RAISER, II., THOMAS G. BARKSDALE, R. FASER TRIPLETT, M.D., and E. LEE WALKER,

Defendants.

---

Civil Action No. 89-457 (LON)

**AMENDED CLASS ACTION COMPLAINT**

JURY TRIAL DEMANDED

Plaintiffs, for themselves and all other members of the class hereinafter described, for their Complaint allege, upon personal knowledge with respect to the allegations pertaining to themselves and upon information and belief with respect to the allegations pertaining to defendants, as follows:

## NATURE OF THE ACTION

1. This is an action for damages arising out of a continuing scheme, consummated on April 4, 1989, between BellSouth Corporation ("BellSouth") and the directors of Mobile Communications Corporation of America ("MCCA") to sell MCCA to BellSouth at a grossly unfair price through false, deceptive and misleading means. The merger agreement dated February 19, 1988 (the "Merger Agreement") whereby MCCA agreed in essence to be acquired by BellSouth, contemplated a closing sometime in 1989. Shortly after the Agreement was made, it began to become apparent that the acquisition price to be paid to MCCA shareholders was far below the actual value of the company.

2. Defendants procured MCCA shareholder approval of the merger in August, 1988 -- by a remarkably slim margin -- on the basis of a false and misleading proxy statement which led the shareholders to believe that MCCA had broad rights at any time prior to or after the shareholder approval to terminate the Merger Agreement in the best interests of the MCCA shareholders.

3. As the value of the company continued to increase dramatically during 1988 and into 1989, the MCCA board refused to exercise their fiduciary duty and wrongfully refused to terminate the Merger Agreement which delivered MCCA at a price unarguably far below actual value. It determined to consummate the BellSouth takeover regardless of its unfairness to MCCA shareholders, and wrongfully rejected the efforts of third parties to open negotiations and offer MCCA shareholders a significantly higher price for their company. The members of the MCCA board deliberately rejected these eager third parties because they knew they would not be able to close the BellSouth deal at the low contract price had negotiations with other buyers commenced.

4. In the Spring of 1989, both BellSouth and the MCCA board publicly took the position that the terms of the

deal were "firm" and could not be changed. Then, as unsolicited proposals came into MCCA, BellSouth and the MCCA board secretly proceeded to renegotiate the deal. In return for their rejection of all third parties, the MCCA directors were rewarded by BellSouth, which paid millions of dollars into Mtel, a company to be operated by MCCA board members and substantially owned by them. Enriched by this improper quid pro quo which damaged the shareholders, the MCCA board agreed to an immediate closing and railroaded through the consummation of the deal on 24 hours' notice so as to preclude all further requests to negotiate from potential buyers.

5. In short, the MCCA board members -- personally protected by a broad indemnity given to each of them by BellSouth -- delivered the company to BellSouth at a grossly inadequate price. In denying the MCCA shareholders the value of their company, defendants violated the federal securities laws, breached their fiduciary duties at common law and committed common law fraud.

## THE PARTIES

6. Plaintiff Sandler Associates L. P. ("Sandler") is a investment limited partnership formed under the laws of the State of New York, with its principal place of business at 1114 Avenue of the Americas, New York, New York. During the class period Sandler was the holder of in excess of 718,500 Class A and Class B shares of common stock of MCCA, representing over 3% of the outstanding shares of MCCA.

7. Plaintiff Daniel R. McCarthy is a citizen of the State of Ohio residing in Shaker Heights, Ohio. During the class period Mr.McCarthy was the holder of in excess of 11,000 Class A and Class B shares of common stock of MCCA.

8. Defendant MCCA is now a wholly-owned

subsidiary of BellSouth and is now known as "Mobilecomm." Prior to becoming a BellSouth subsidiary, MCCA was a Delaware corporation with principal executive offices located at 1500 Capital Towers, Jackson, Mississippi. MCCA provides mobile telecommunication services in more than 100 cities and 34 states. MCCA's business consist of, among other things, local and regional paging services, mobile telephone services, telephone answering services and cellular radio telephone operations.

9. As of July 20, 1988, MCCA had some 12,002,230 shares of Class A and 11,599,164 share of Class B common stock. Class A common stock was entitled to 1/10th vote per share and Class B common stock was entitled to one vote per share. Both classes of MCCA stock were traded on the NASDAQ National Market System.

10. Individual defendants Xavier W. Nady, John N. Palmer, C. Victor Raiser, II., Thomas G. Barksdale, R. Faser Triplett, MD., and E. Lee Walker, were all directors of defendant MCCA at all relevant times and upon information and belief are citizens of states other than Ohio and New York. Defendants Palmer, Raiser, Walker and Barksdale are also officers, directors, employees or consultants of Mtel, as described herein.

11. Defendant BellSouth is a Georgia corporation with principal executive offices at 1155 Peachtree St., N.E., Atlanta, Georgia.

12. Defendant BLS Acquisition Corp. I, Inc. ("BLS") is a Delaware corporation and a wholly-owned subsidiary of BellSouth, and was the vehicle through which BellSouth acquired MCCA.

## JURISDICTION AND VENUE

13. This action arises under sections 11, 12(2), 15 and

17(a) of the Securities Act of 1933, as amended (the "Securities Act"), 15 U.S.C. §§ 77k, 771, and 77o; under sections 10(b), 14(a) and 20 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78n(a), 78(t) and 78w (a), and Rules 10b-5, 14a-5 and 14a-9 promulgated thereunder by the Securities and Exchange Commission (the "SEC"); and under applicable principles of common law.

14. The subject matter jurisdiction of this Court is based upon section 22 of the Securities Act, 15 U.S.C. § 77v, upon section 27 of the Exchange Act, 15 U.S.C. § 78aa, upon diversity of citizenship, the action being between citizens of different states and the sum in controversy exceeding $50,000 exclusive of interests and costs, and upon principles of pendent jurisdiction.

15. Venue is properly laid in this district under Section 27 of the Exchange Act, 15 U.S.C. § 78(aa), 18 U.S.C. § 1965, and also under 28 U.S.C. § 1391(b) in that all corporate defendants reside in this district within the meaning of 28 U.S.C. § 1391(c). The individual defendants, acting in their capacity as directors of the defendant MCCA, and acting in concert with BellSouth, directed or authorized that the wrongful acts pleaded herein be committed on behalf of MCCA, and many of those acts which give rise to the claim herein arose within this District, including the filing and dissemination of the materially false and misleading documents.

16. In connection with the acts and conduct alleged in this Complaint, defendants directly and indirectly used means and instrumentalities of interstate commerce, including the United States mails, and interstate wires, including telephone communications, and the facilities of the NASDAQ system.

17. This action is not brought collusively to confer jurisdiction upon this Court which it would not otherwise have.

## CLASS ACTION ALLEGATIONS

18. This action is brought by plaintiffs on their own behalf and under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all other members of the "MCCA Shareholder Class," which consists of all persons who held the common stock of MCCA prior to April 4, 1989, the Effective Date of the BellSouth-MCCA Merger, other than the defendants. As of February 29, 1988, the MCCA Class A common stock and MCCA Class B common stock had approximately 280 and 2,570 holders of record respectively, and these shareholders are geographically disbursed. This class is so numerous that the joinder of every individual class member is impracticable.

19. There are common questions of law and fact that relate to and affect the rights of each member of this class of shareholders.

20. Among the common questions of law and fact are:

(a) Whether the federal securities laws and the common law were violated by defendants' acts and omissions as alleged herein;

(b) Whether defendants participated in and pursued the course of conduct and conspiracy complained of;

(c) Whether documents and statements disseminated to the investing public and filed with the SEC during the class period were misleading and omitted and/or misrepresented material facts regarding the terms and effect of the Merger Agreement;

(d) Whether defendants acted willfully, recklessly, or with gross negligence in omitting to state or in mis representing material facts or in aiding and abetting the making of such omissions or misstatements;

(e) Whether members of the classes have sustained damages; and

(f) What is the proper measure of damages.

21. The relief sought is common to the entire class.

22. The claims of plaintiffs are typical of the claims of each member of the class as plaintiffs and all members of the class sustained damages arising out of defendents' unlawful conduct complained of herein.

23. Plaintiffs will fairly and adeguately protect the interests of the class. The attorneys for plaintiffs are experienced and capable in class and securities litigation, and will actively conduct plaintiffs' case herein.

24. This action is properly maintained as a class action in as much as the questions of law and fact common to the members of the class predominate over any questions affecting individual members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. There will be no difficulties likely to be encountered in the management of the case as a class action.

## THE FACTS

### The Continuing Close relationship Between MCCA and BellSouth

25. The Merger Agreement was the culmination of a continuing and systematically maintained inter- relationship between the MCCA Board of Directors and BellSouth. Since at least 1986 the two companies entered into joint venture agreements covering significant aspects of MCCA's businesses. In 1986 MCCA granted BellSouth an option to purchase up to 15% of MCCA's shares at a price of $13.50 per share.

26. In early 1988, MCCA conducted which it has publicly described as an open "auction" of the Company to the highest bidder. By that time, however, the MCCA board apparently had little intention of seriously considering a merger with any entity other than BellSouth. In February, 1988 the MCCA board sought to discourage competing bidders prior to the finalization of the Merger Agreement with BellSouth. The nature of the negotiations leading up to the Merger Agreement showed that the inside track -- effectively the exclusive track -- was given by the MCCA board to BellSouth in its effort to reach an agreement to take over MCCA.

27. BellSouth was the only potential buyer to which MCCA gave access to critical non-public data regarding MCCA's cellular proporties. BellSouth's principal rival for MCCA, McCaw Cellular Communications, Inc. ("McCaw"), was denied access to any of this information already possessed by BellSouth. This information regarding the nature and value of MCCA's operations was invaluable to any party considering a bid for MCCA. Moreover, although MCCA had its headquarters in Jackson, Missisippi, the critical MCCA board meetings were held in Atlanta, Georgia -- BellSouth's hometown.

28. Although defendants sought to give the appearance of an open process, they prevented any true

competition for the acquisition of MCCA and BellSouth had little trouble sealing an agreement in February, 1988 to take over MCCA at a price which even then was extremely favorable to BellSouth.

29. In conjunction with the execution of the Merger Agreement, MCCA entered into a series of side agreements which gave BellSouth various special rights and exclusive options to buy substantial MCCA assets under certain conditions, and granted BellSouth an option on an additional 15% of its shares. With the options and rights earlier granted BellSouth, these arrangements effectively "locked up" BellSouth's acquisition of MCCA.

30. MCCA's directors also granted BellSouth irrevocable proxies to vote shares representing approximately 8% of the combined voting power of all MCCA shares at the upcoming special meeting of shareholders to vote on the Merger Agreement.

31. The MCCA Proxy Statement dated July 21, 1988 admitted that these and other special rights to lock up BellSouth's control of MCCA might "have the effect of discouraging a third-party from acquiring control of MCCA." Continuing up to and through April 4, 1989 defendants BellSouth and the MCCA board successfully implemented their scheme to discourage and effectively prevent any third party from offering the MCCA board a fair price for MCCA.

**The Terms of the MCCA-BellSouth Merger**

32. The Merger Agreement contemplated that a closing could not occur for many months, and likely a year or more, after the February 1988 execution of the Agreement. This delay, during which time BellSouth had in effect a lock on MCCA, was primarily for the purpose of obtaining numerous federal and State regulatory approvals.

33. As one of many conditions of the Merger, BellSouth was required to obtain from the District Court for the District of Columbia waivers of provisions in the Modified Final Judgment ("MFJ") in the ongoing antitrust proceedings relating to the divestiture of assets of the American Telephone & Telegraph Company, United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982) (Harold Greene, D. J.), aff'd, 460 U.S. 1001 (1983). This was necessary to allow BellSouth to provide interLATA paging services and thereby to permit the acquisition of certain MCCA assets.

34. Upon the closing contemplated under the Merger Agreement, each outstanding share of MCCA common stock would be converted into the right to receive $28.75 worth of BellSouth common stock. In addi tion, Mobile Telecommunications Technologies, Corp. ("Mtel"), a wholly-owned subsidiary of MCCA, would be spun off to MCCA shareholders, who would receive one Mtel share, initially valued by the MCCA board at approximately $2.25, for each MCCA share. As such, the value of the total consideration to be paid by BellSouth for each MCCA share would be approximately $31.00 in BellSouth stock.

35. In the Merger Agreement, MCCA agreed not to solicit or initiate discussions with any third party concerning a merger with MCCA or the acquisition of MCCA stock or assets. The Merger Agreement, however, expressly permitted MCCA at any time and thus required the board "in the exercise of its good faith judgment as to its fiduciary duties to shareholders of [MCCA] based upon the advice of counsel," to discuss any unsolicited acquisition proposals from third parties, to provide non-public in formation to such third parties and to enter into an agreement to merge with or be acquired by a third party.

36. MCCA's only obligation to BellSouth in this regard was to notify BellSouth of proposals received by MCCA from third parties regarding a possible acquisition or merger. BellSouth was given no right to prevent MCCA from

proceeding to explore any such unsolicited inquiries or proposals. In short, under the Merger Agreement MCCA was free to entertain unsolicited inquiries and to consummate alternate deals if doing so was in the best interests of its shareholders.

37. The Merger Agreement expressly permitted the MCCA board to abandon the BellSouth deal and to terminate the Merger Agreement:

> **Termination and Abandonment.** This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time,[1] before or after the approval by the shareholders of [MCCA]:
>
> (f) By the Board of Directors of the Company [MCCA], if it, in the exercise of its good faith judgment, based upon the advice of counsel, determines that its fiduciary duties to the Company's shareholders require that it: (i) not recommend approval of this Agreement by the Company's shareholders, or that it withdraw such recommendation, or (ii) take an action specified in Section 6.01(e)(ii)...

(Merger Agreement, § 9.01 (emphasis added)

38. Section 6.01(e)(ii) of the Merger Agreement refers to an action by MCCA to "merge with, liquidate into or otherwise combine with any other person, firm, corporation or entity, [or] enter into any agreement to merge with, liquidate into or otherwise combine with any other person, firm, corporation or entity."

---

[1] The "Effective Time" was defined at occurring after the closing of the Merger, when the Certificate of Merger would be filed with the State of Delaware.

39. In sum, if it were in the best interests of its shareholders, the MCCA board could terminate the Merger Agreement by (i) deciding against proceeding with it or (ii) by entering into an agreement to merge with or be acquired by a third party. If MCCA elected to terminate the Merger Agreement pursuant to either subclause (i) or (ii) of Section 9.01(f), it was required to pay BellSouth $25 million.

40. Significantly, the Merger Agreement included a broad indemnification given by BellSouth to the MCCA board members for all claims arising out of BellSouth's takeover of MCCA.

**The Spin-off of Mobile Telecommunication Technologies Corporation - "Mtel"**

41. The creation and spin-off of Mtel to the MCCA shareholders was required by restrictions on the type of assets BellSouth, as a regional Bell operating company, can acquire under the federal antitrust MFJ. The spin-off of Mtel would not have been required if a party other than a regional Bell operating company acquired MCCA.

42. A majority of the MCCA board -- defendants Palmer, Raiser, Barksdale and Walker -- became directors of Mtel in 1988 after the execution of the Merger Agreement and have lucrative employment contracts with Mtel. Defendant Palmer is Mtel's Chairman of the Board and Chief Executive Officer. Defendant Raiser serves as Vice Chairman of the Board and Secretary of Mtel. Defendant Barksdale is Mtel's President and Chief Operating Officer.

43. In late 1988, Mtel granted this majority of the MCCA board options to purchase some 1,420,000 shares of Mtel at $2.25, and Mtel was authorized to grant over one million more such options. These defendants were further rewarded by the replacement of their unexercised MCCA options with options to purchase BellSouth shares

44. In preparation for MCCA's distribution to its shareholders of the Mtel shares prior to the closing of the Merger, MCCA caused Mtel to file a registration statement with the SEC on Form 10 (the "Mtel Registration Statement") which provided certain information, includinq information about the value of Mtel and the distribution of Mtel's stock to MCCA shareholders.

45. Starting in 1988 in anticipation of the distribution in 1989 of Mtel shares, MCCA shareholders had the ability to sell their rights to receive Mtel shares through "when, as and if issued" contracts executed in the over-the-counter market through NASDAQ system.

46. Numerous MCCA shareholders sold or otherwise alienated their rights to receive Mtel shares between late 1988 and April 3, 1989.

**The MCCA Shareholder Vote On the Merger**

47. On or about July 21, 1988, defendants sent the MCCA shareholders a Notice of Special Meeting of Stockholders, scheduled for August 24, 1988, to vote on the Merger Agreement. Distributed with the Notice was a Proxy Statement to MCCA shareholders and a Prospectus covering the issuance of BellSouth shares to be exchanged for MCCA shares as payment for the acquisition of MCCA. The Proxy and the Prospectus both dated July 21, 1989, were jointly issued by MCCA and BellSouth (the "Proxy/Prospectus").

48. The Proxy/Prospectus described the Merger Agreement and recommended approval of the BellSouth Merger. BellSouth also filed with the SEC a Registration Statement on Form S-4 (the MCCA Registration Statement") pursuant to the Securities Act, of which the Proxy/Prospectus was a part.

49. Notwithstanding the unqualified language of the

Merger Agreement stating that it could be terminated "at any time ... before or after the approval by the shareholders," defendants secretly took the position that this clause unambiguously meant that subsequent to the shareholder vote, the MCCA board lacked the power to terminate the Merger Agreement pursuant to § 9.01(f)(i).

50. The Proxy/Prospectus nowhere disclosed this position or any other limitation or qualification upon the scope of § 9.01(f)(i). Indeed, the Proxy/Prospectus in its explanation to the MCCA shareholders reiterated explicitly the plain language of the Merger Agreement providing for its termination by the MCCA "at any time" regardless of shareholder approval.

51. Neither plaintiffs nor any other class member could reasonably infer from anything in the Proxy/Prospectus that defendants had secretly determined that "at any time ... before or after the approval by the shareholders" meant "only before the approval by the shareholders." Defendants concealed this position from plaintiffs and the class members. The Proxy/Prospectus was thus drafted deliberately, recklessly or with gross negligence so as to lead any reasonable person reading the Proxy/Prospectus to believe that no such interpretation existed or would ever be asserted.

52. At the special meeting on August 24, 1989, the MCCA shareholders' support for the Merger Agreement was far from universal. Only 60% of the outstanding voting power was voted in favor of the BellSouth transaction, and even that low level of support was only achieved with the irrevocable proxy for 8% of MCCA shares previously given to BellSouth by the MCCA board for the purposes of this shareholder vote.

53. This affirmative shareholder vote was made in reliance on the description of the terms of the Merger Agreement in the Proxy/Prospectus. As such, defendants procured approval of the Merger Agreement by leading the MCCA shareholders to believe that their board had the

continuing right "at any time prior to the Effective Date, before or after the approval by the shareholders" to terminate the Merger Agreement pursuant to § 9.01(f), conditioned only upon payment to BellSouth of the S25 millon "break up" fee.

54. The Proxy/Prospectus represented to the MCCA shareholders that there were numerous regulatory and technical hurdles to be surmounted before BellSouth could complete its acquisition of MCCA. It was explained that the Merger was expected to become effective within a year after the August 1988 shareholder approval, but even that date could not be assured and might be extended

55. The rapidly escalating market for cellular properties, coupled with the possible year and a half or more between the time the price was set in February 1988 and the ultimate consummation of the Merger, rendered the meaning of § 9.01(f) of the Merger Agreement critically material to MCCA and its shareholders. This merger would be MCCA's last transaction as an independent entity. The issue as to whether during the entire pendency of the Merger Agreement the MCCA board was free to negotiate with third parties and to terminate the Merger Agreement in the best interests of the shareholders was of the utmost importance to MCCA shareholders.

56. The MCCA shareholders relied on the Proxy/ Prospectus and the registration statements. In light of the plain language of § 9.01, defendants' complete omission of any explanation or statement of their secret interpretation of § 9.01(f)(i) constituted a continuing misrepresentation to and a continuing fraud upon the MCCA shareholders, who were induced to approve the Merger, and not to take action to set the approval aside.

**The Soaring Value of MCCA Shares**

57. The cellular telecommunications industry has been marked by rapid growth and fast appreciation of values of companies in the field. Since the mid-1980's it has been common to see sharp increases in values of telecommunications companies in only a few months' time. Indeed, as early as January 1988, while MCCA was still negotiating the terms of this Merger, MCCA's Chairman received a complaint from a major shareholder objecting to MCCA's entering into an agreement which locked up the company for many months at an acquisition price that would undoubtedly be significantly lower than MCCA's true value by the time of the anticipated closing a year or more later. The MCCA board ignored explicit cautions such as this.

58. Cellular telephone properties are in essence the franchises to provide services to discrete geographic markets, usually particular metropolitan areas. Cellular properties are typically valued on a "per pop" basis, referring to the population within the particular market and the price paid per population unit. Different markets will have varying "per pop" prices depending on the "quality" of the market, which relates to such factors as urban density, mobility and affluence of the population, patterns of acceptance of new technologies and the concentration and types of businesses within the market. Depending upon the size, percentages and number of franchises a cellular company owns, it can be said to have a total number of "pops", and the company can then be valued by multiplying that number by the current average fair estimate of a "pop" in the particular markets served.

59. The February 1988 BellSouth-MCCA Merger Agreement represented a price of approximately $70 "per pop." Even at that time this price was considered extremely low for MCCA, which owned some of the highest quality markets in the entire nation.

60. By the Summer of 1988 -- before the MCCA

shareholders voted on the BellSouth proposal -- it was already apparent that the BellSouth acquisition was unfair to the MCCA shareholders. Even under defendants' concealed interpretation of the Merger Agreement the MCCA board had the power up until the shareholders vote in August, 1988 to terminate the Agreement in the best interests of the shareholders. The MCCA board, however, continued to disregard this market information and failed to obtain an independent and expert assessment of the value of their company. The board ignored its duty to maximize shareholder values and refused to terminate the Agreement.

61. By early 1989 -- the MCCA board itself conceded that the fair price for MCCA was substantially higher than what BellSouth had agreed to pay a year earlier. Investment professionals and those in the telecommunications industry concurred that values of cellular telephone properties had continued to rise dramatically throughout 1988 and into 1989.

62. In January 1989, a 22% interest in McCaw Cellular Communications, Inc. was sold to British Telecommunications for a remarkably high price. This non-controlling stake in McCaw was sold for a price of approximately $140 "per pop," roughly twice that set in the MCCA-BellSouth transaction. Moreover, the BellSouth price was all the more inadequate when viewed against the fact that many of MCCA's markets were among the highest quality in the nation and were superior to those owned by McCaw.

63. The MCCA board disregarded the significance of the McCaw transaction. The McCaw sale made even more obvious what had been apparent months earlier: that due to the wrongful conduct of its board MCCA was in the process of selling itself to BellSouth for less than half of its real value.

64. By early 1989, expert opinion and industry analyses uniformly placed the value of the MCCA's assets (exclusive of its ownership of the undistributed Mtel common stock) at far in excess of the $28.75 worth of BellSouth stock

that MCCA shareholders would receive if the BellSouth merger were closed. By March 1989 expert appraisals of the fair market value of MCCA ran as high as $67.00 and $76.00 per share. These experts appraised MCCA as worth $200 to $250 "per pop" or more.

65. In May 1989 McCaw entered into an agreement to purchase a minority interest in the Santa Barbara, California, cellular market. This acquisition, of a lower quality market than several serviced by MCCA, was made at the price of approximately $250 to $275 "per pop."

66. More recently, an unsolicited bid has been made for Lin Broadcasting Corporation, a cellular company in many ways comparable to MCCA, at a price of approximately $290 "per pop." This high price could rise even higher before the future of Lin Broadcasting Corporation is finally resolved.

67. In short, a year after the Merger Agreement -- yet still before the closing -- there could be no question to anyone who inquired that MCCA was worth at least twice the amount the MCCA shareholders would receive from the BellSouth transaction. By that time, even a conservative appraisal of the aggregate value of fully-diluted MCCA shares was some $1,557,000,000, or over $850 million more than the aggregate consideration MCCA's common shareholders would receive under the Merger Agreement.

68. Reflecting these values, MCCA shares by March 1989 were trading on the NASDAQ system at prices above the BellSouth acquisition price. This occurred even before third parties expressed interest in acquiring MCCA, as described below. Clearly, the investment community understood that the Merger Agreement under certain circumstances permitted -- and their fiduciary duties required -- the MCCA board to terminate the BellSouth Merger to enable the company to enter into a fair deal at a more realistic price.

69. Rather than discharge their duty by attempting to

secure for MCCA shareholders the value of their company, the MCCA board determined to foreclose any chances of realizing that value. Defendants took action to make sure BellSouth got MCCA at an unfairly low price.

**Defendants' Successful Efforts to Speed Up the Closing**

70. One of the conditions to the Merger was a waiver of the MFJ provisions which prevented BellSouth from providing multiLATA one-way paging services regardless of geographic scope. In September 1988, the U.S. Department of Justice made a motion to Judge Greene of the District of Columbia District Court, for the benefit of the seven regional Bell operating companies, including BellSouth, for a blanket waiver of the MFJs multiLATA paging limitations.

71. By January of 1989, as cellular property values continued to surge, Judge Greene had still not granted the waivers needed by BellSouth. Following the January announcement of the high price paid for a 22% interest in McCaw, BellSouth filed a motion for expedited consideration of the Department of Justice's earlier motion for waiver of the MFJ multiLATA provisions.

72. BellSouth specifically represented to Judge Greene that the waiver was needed to enable it to consummate its acquisition of MCCA. Although the Merger Agreement contemplated a closing as late as 1989 or even beyond then, BellSouth and defendant Palmer, Chairman of MCCA, represented to Judge Greene that dire consequences to MCCA would ensue if the BellSouth-MCCA transaction did not close immediately.

73. In view of the huge discrepancy between the true value of MCCA and the consideration BellSouth proposed to pay, on February 16, 1989 counsel for plaintiffs sent a letter to MCCA's board demanding that it exercise MCCA's right under § 9.01(f)(i) to terminate the Merger Agreement. The MCCA

board determined to push through the unfair BellSouth deal and refused this shareholder demand.

74. As pressure mounted on the MCCA board to obtain a fair price of the company, BellSouth filed suit in Delaware Chancery Court for a declaration that MCCA had no right to terminate the Merger Agreement. Rather than contest this restrictive view or at least take a middle position, the MCCA board affirmatively sought so rid itself of its fiduciary duty to maximize shareholder values. Thus, MCCA answered BellSouth's lawsuit by joining in the request that the Delaware court declare that MCCA had no right to terminate the Merger Agreement.

75. Starting on February 21, 1989, a series of MCCA shareholders filed class action lawsuits in the Delaware Chancery Court charging that the MCCA board had breached its fiduciary duties to its shareholders by refusing to terminate the Merger Agreement. The MCCA board disregarded shareholder demands that it notify Judge Greene, who still had not granted all of the approvals needed for the BellSouth acquisition of MCCA, of the pendency of the MCCA shareholder lawsuits.

**The MCCA Board Rejects Third Party Requests to Enter Into Negotiations For A More Attractive Sale of the Company**

76. In February 1989 MCCA received a communication from a third party seeking to open discussions towards an acquisition of MCCA at a price higher than the BellSouth price. The MCCA board refused to pursue this unsolicited inquiry. Other than informing BellSouth, the MCCA board kept this approach secret from its shareholders.

77. On March 27, 1989 the MCCA board received a letter from another interested party, McCaw Cellular Communications, whose president expressed interest "in

immediately commencing negotiations with MCCA with a view towards quickly reaching" an agreement for the sale of or merger with MCCA.

78. In that letter McCaw's President further confirmed that in 1988, when McCaw had tried to negotiate an acquisition of MCCA, MCCA had denied McCaw access to any non-public data regarding MCCA's cellular interests. However, even if MCCA continued to deny McCaw such access, its President stated to MCCA that any current acquisition

> "would result in a price to MCCA's shareholders that was significantly higher than the price under the BellSouth Agreement."

McCaw's letter asked if MCCA would "like us to proceed with such negotiations," and requested confirmation that MCCA could entertain such an unsolicited request to negotiate.

79. MCCA board's response to this request for negotiations was a flat rejection which gave no reason for MCCA's refusal to explore McCaw's overture. Defendant Palmer, MCCA's Chairman, falsely wrote that MCCA is not now in a position to take <u>any</u> action in response to your letter."

80. The MCCA board had no justification under the Merger Agreement or elsewhere for its absolute refusal to confer with McCaw. The board's fiduciary duty to its shareholders required that it proceed, at the very least, to inquire further into McCaw's request for negotiations. The MCCA board knew from McCaw's 1988 attempt to buy MCCA of McCaw's keen interest and ability to complete the transaction. The MCCA board knew that McCaw not only already had ample cash reserves sufficient to complete an MCCA acquisition, but was scheduled soon to receive large additional cash payments from the purchase by British Telecommunications of an interest in McCaw. Moreover, the MCCA board knew that McCaw would not encounter the regulatory obstacles that attended BellSouth's attempt to

acquire MCCA.

81. In late March 1989, the MCCA board also stated that it had received a second letter relating to a possible sale of or merger between MCCA and another party besides McCaw. The MCCA board also refused to pursue this unsolicited inquiry, to the further detriment of the MCCA shareholders.

82. BellSouth improperly threatened to take action against MCCA if its board considered entertaining an alternate bid for the company. BellSouth further made improper attempts to discourage third parties from pursuing an acquisition of MCCA.

**The Restructuring of the BellSouth-MCCA Merger to Enable an Expedited Closing and the Last-Minute Sweetening of the Mtel Deal by BellSouth to Induce the MCCA Board To Go Through With the Unfair Deal**

83. On March 27, 1989 MCCA announced publicly that it expected the BellSouth Merger to occur on April 10, 1989.

84. On March 29, 1989, a motion in the Delaware Chancery Court for a preliminary injunction against the BellSouth-MCCA closing was denied.

85. On April 3, 1989 MCCA issued a press release announcing the rescheduling of the closing of the BellSouth Merger. The closing -- previously scheduled for April 10, 1989 -- was moved up and set for the very next day, April 4, 1989.

86. The April 3 MCCA press release stated that all conditions to consummation of the closing were expected to be satisfied within 24 hours. Among other things, the MCCA board had acquiesced in BellSouth's demands that MCCA restructure the Merger so as to remove the need for the remaining MFJ waivers which still had not yet been received

and which the Proxy/Prospectus had represented were necessary for a closing.

87. The MCCA press April 3 relea also announced that the company had agreed in principle to settle two pending putative class action lawsuits recently brought in the Delaware Chancery Court by two holders of a small number of shares of MCCA stock (the "small shareholders").

88. This public announcement of a tentative settlement with the small shareholders had and attained the objectives of signalling to the public -- and in particular to potential bidders for MCCA -- that any efforts to prevent BellSouth from taking over MCCA within the next 24 hours would be futile.

89. In another eleventh-hour change in the terms of the Merger, MCCA announced in its April 3 press release that BellSouth had irrevocably committed to make an equity contribution to Mtel the next day in the amount of $18,300,000. This equity contribution represented a substantial increase in the value of Mtel, which was a relatively small company and had less than $5 million in cash on hand. As a result of this last-minute addition to the equity of Mtel, the Mtel shares became instantly more valuable.

90. The press release further stated that BellSouth would contribute an additional $4,700,000 in equity to Mtel and issue a small number of additional BellSouth shares to MCCA shareholders as of April 3, if -- but only if -- the Delaware Chancery Court gave complete approval to the tentative settlement with the small shareholders. The payment of this additional $4.7 million and BellSouth shares was conditioned upon the Delaware Chancery Court's dismissing any and all claims, including those asserted in this complaint, arising out of or in any way connected with the sale of MCCA to BellSouth. Thus, for a relative pittance the defendants conspired, with the aid of the small shareholders, to obtain immunity from -- and silence forever -- potential claims for

over $2 billion. In return for all this, defendants have agreed not to oppose an application by the attorneys for the small shareholders of a fee of almost $1 million.

91. Significantly, it was later admitted that the negotiations leading up to this improper deal were initiated not by the small shareholders but by defendants, who urgently needed to announce such a "settlement."

92. The MCCA shareholders who sold their Mtel rights did so prior to the April 3 press release in reliance on, and were misled by, the information and disclosure made to them in the Proxy/Prospectus, the Mtel Registration Statement and/or other pubic statements by defendants. None of those documents made any reference to the upcoming $23 million increase in the cash assets of Mtel.

93. The holders of the Mtel interests sold their interests in the approximate range of $2.50 to $3.50 per share. Almost immediately after the announcement of this large equity contribution to Mtel, the price of Mtel shares rose to $5.00 and continued to rise thereafter. Mtel stock has recently traded in excess of $12 per share.

**The MCCA Board's Breaches of Its Duties to MCCA Shareholders**

94. On April 4, 1989, defendants' continuing scheme succeeded and the BellSouth-MCCA Merger was closed notwithstanding the attempts of third parties to offer significantly higher prices to the MCCA shareholders.

95. In the period between February 1988, when MCCA entered into the Merger Agreement, and August 24, 1988, when the MCCA shareholders narrowly voted to approve the Agreement in reliance on the Proxy/Prospectus, this continuing scheme resulted in the board's taking no action to protect its shareholders despite the escalating market value

of cellular properties in general and of the increasing value of MCCA in particular.

96. In light of the true value of MCCA, during the period prior to the shareholder vote the MCCA board failed to discharge its fiduciary duties to MCCA's shareholders by failing to obtain expert information on the value of MCCA and by refusing to exercise its admitted right under § 9.01(f)(i) of the Merger Agreement to terminate that Agreement.

97. Between the August 24, 1988 shareholder approval and the April 4, 1989 closing of the Merger, the MCCA board continued to disregard the escalating value of MCCA's assets and the fairness of the consideration to be received under the Merger Agreement. The MCCA board kept itself willfully ignorant of the mounting evidence of soaring cellular property values since the Merger Agreement was finalized a year earlier. The MCCA board refused to ask its investment advisor for an update on values even after the January 1989 British Telecommunications purchase of a minority interest in McCaw's comparable cellular properties at a strikingly high price. As late as March 1989, MCCA's Chairman, defendant Palmer, admitted that he was unable to give an opinion as to the current value of his company.

98. During the period following the shareholder vote, the MCCA board refused to exercise its right under § 9.01(f)(i) of the Merger Agreement to terminate the Merger Agreement and, if there were any question as to this right, failed to review the issue and seek the opinion of legal counsel. The MCCA board failed to explore either the possibility of terminating or renegotiating the Merger Agreement or negotiating a merger with a different purchaser.

99. Even after the shareholder vote, MCCA had the right under § 9.01(f)(ii) to terminate the Merger Agreement by entering into a merger or sale agreement with a third party.

100. The MCCA board wrongfully threw away this

right and affirmatively assisted BellSouth's takeover of MCCA at an unfair price by refusing without justification to entertain the unsolicited proposals to negotiate immediately with at least three third parties. The MCCA directors rejected these unsolicited overtures because they knew that they would not be able to close the BellSouth Merger at the low contract price once negotiations with eager alternate buyers commenced.

101. The MCCA board made sure there would be no alternatives to BellSouth by restructuring the BellSouth Merger so as to enable an immediate closing on 24 hours' notice and thereby foreclose any negotiations with third parties desirous of acquiring or merging with MCCA. The MCCA board recklessly disregarded the fact that additional proposals would have been made to MCCA had the closing not been rescheduled and completed on 24 hours' notice. The MCCA board knew that a different bidder, unconstrained by the MFJ, was not required to and might not have included in its proposal the spinoff of Mtel.

102. Such an alternate deal, though far more profitable for the MCCA shareholders, might have eliminated the lucrative executive positions at Mtel that four of the MCCA Directors would assume if, but only if, the BellSouth Merger was completed. Such an alternate deal would also have eliminated their lucrative multi-million dollar Mtel stock options.

103. Thus, notwithstanding defendants' numerous public statements that this was a "firm" deal, the MCCA board entered into secret settlement negotiations with BellSouth to get BellSouth to sweeten the terms of the Merger to give a minimal benefit to the shareholders but principally to benefit the MCCA board. In return for the MCCA board rejecting all efforts of third parties to enter into alternate transactions BellSouth agreed at the last minute to pay $18.3 million in cash into Mtel.

104. This additional $18.3 million consideration sent

the price of Mtel shares soaring and was done for the private benefit of the MCCA board members who had options to buy in excess of 1,400,000 shares of Mtel at the very low exercise price of $2.25 per share. Shortly after this equity contribution, defendants Palmer, Raiser, Barksdale and Walker were enriched as their options jumped in value by over $13 million.

105. As a result of their relationship with Mtel, this majority of the MCCA board had a fundamental conflict of interest with the MCCA shareholders. Indeed, the Proxy/Prospectus admitted that these defendants' simultaneous control of MCCA and the spin-off company "may involve conflicts of interest where the interests of MCCA and [Mtel] are adverse."

106. When the chips were down, these MCCA defendants resolved this conflict in favor of themselves and against MCCA shareholders. Fully knowing that a number of MCCA shareholders had previously sold their rights in Mtel, the MCCA board deliberately structured a settlement which enriched Mtel and left these MCCA shareholders out in the cold. There was no need whatsoever to sweeten the deal through Mtel -- except the desire to pay off the MCCA directors who thwarted third parties seeking to help the MCCA shareholders by breaking BellSouth's lock on the company.

107. In return for BellSouth's enrichment of the MCCA defendants with Mtel options, and protected by BellSouth's indemnity against lawsuits, the MCCA board delivered MCCA to BellSouth at a grossly unfair price. In sum, the MCCA board showed unquestioning loyalty to BellSouth and breached its trust to the MCCA shareholders.

## COUNT I

## VIOLATIONS OF SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5

108. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

109. The defendants knew, or but for their reckless disregard of the facts should have known, that the misrepresentations and omissions described herein were false when made or that they omitted material facts necessary in order to make the statements in the Proxy/Prospectus not misleading.

110. In reliance on the false and misleading Proxy/Prospectus, MCCA's shareholders were induced to and did vote by a slim majority to approve the Merger Agreement on August 24, 1988. The members of the MCCA Shareholder Class relied on the accuracy of the Proxy/Prospectus and were forced to surrender and exchange their MCCA shares for grossly inadequate consideration representing half or less the true value of their shares and were damaged thereby.

111. The defendants knew, or but for their reckless disregard of the facts should have known, that the Mtel Registration Statement as amended was false and misleading in that it failed to state that MCCA would transfer additional assets into Mtel immediately prior to the distribution of Mtel shares to MCCA shareholders, and understated the value of Mtel's assets as of the date of the distribution.

112. The purpose and effect of defendants' misrepresentations and omissions, all of which were part and parcel of a continuing scheme and conspiracy to defraud, was to force plaintiffs and the other members of the class to surrender and exchange their shares for a fraction of their value in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

## COUNT II

## VIOLATIONS OF SECTION 17(a) OF THE SECURITIES ACT

113. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

114. The Proxy/Prospectus and the registration statements contained material misrepresentations and omissions and defrauded the MCCA shareholders as described herein. These misrepresentations and omissions violated section 17(a) of the Securities Act.

## COUNT III

## VIOLATIONS OF SECTION 11 OF THE SECURITIES ACT

115. Paragraphs 1 through 107 are herein as though fully restated and realleged.

116. The MCCA Registration Statement and the Mtel Registration Statement contained untrue statements of material facts or omitted to state material facts which were required to be stated therein in order to make those statements not misleading.

117. The MCCA shareholders had no knowledge of the false statements and omissions contained in the MCCA and Mtel Registration Statements and relied upon those statements and omissions to their injury.

118. The misrepresentations and omissions described herein violated section 11 of the Securities Act.

## COUNT IV

## VIOLATIONS OF SECTION 12(2) OF THE SECURITIES ACT

119. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

120. The Proxy/Prospectus and the registration statements contained misrepresentations or omissions of facts which were, or as the passage of time developed became, material.

121. The MCCA shareholders had no knowledge of the misrepresentations and omissions in these documents and could not reasonably have known of such misrepresentations and omissions and consequently relied upon them. The misrepresentations and omissions described herein violated section 12(2) of the Securities Act.

## COUNT V

## VIOLATIONS OF SECTION 15 OF THE SECURITIES ACT AND SECTION OF 20 OF THE EXCHANGE ACT

122. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

123. The individual defendants are or were controlling persons with respect to MCCA, which was a controlled person.

124. The individual defendants are jointly and severally liable for the violations by the controlled person MCCA of Sections 11 and 12(2) of the Securities Act and of Section 10(b) of the Exchange Act alleged herein.

## COUNT VI

## VIOLATIONS OF 18 U.S.C. §§ 1962(a)-(d)

125. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

126. Commencing at least as early as February, 1988, BellSouth and the MCCA board formed an enterprise in interstate commerce to conduct a systematic and continuing pattern of illegal activity. The objective of the enterprise was to secure for BellSouth, at a price substantially below actual value, the ownership of MCCA and to secure for the MCCA directors substantial stock benefits and other interests in Mtel which they would not have otherwise obtained. The pattern of illegal activity through which the enterprise was conducted included the making of the Merger Agreement, the continuing misrepresentations and omissions contained in the Proxy/Prospectus and other public documents set forth above, the speeding up of the closing in early April 1989 set forth above, the rejection of third party requests by the MCCA board to enter into negotiations for a more attractive sale of the company and the last minute sweetening by BellSouth of the Mtel deal with the attendant personal benefits to the MCCA board members as set forth above, all in violation of 28 U.S.C. §§ 1962(a), (b), (c) and (d).

127. In carrying out this enterprise through a continuing and schematic pattern of unlawful activity, defendants BellSouth and the MCCA board have availed themselves of interstate means of communication, including telephonic transmissions and the U.S. mails, for the purpose of making false representations in furtherance of the scheme to defraud in violation of 18 U.S.C. §1341 and § 1342. The transactions that are the subject of the acts in violation of 18 U.S.C. § 1341 and § 1342 are referred to above.

## COUNT VII

## BREACH OF FIDUCIARY DUTY

128. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

129. The MCCA board had a continuing fiduciary duty: (i) to keep itself at all times informed of the current value of MCCA's assets and of its common stock; (ii) not to waste MCCA's assets by disposing of them for grossly inadequate consideration; (iii) to respond affirmatively to requests to negotiate a sale or merger and to explore available alternatives to the BellSouth Merger; (iv) to preserve and exercise all rights and options under the Merger Agreement, including terminating the Agreement, when in the best interests of the MCCA shareholders, and (v) not to exploit the conflict of interests inherent in their receiving enhanced value of the stock interests and stock options in Mtel for personal benefit at the expense of the MCCA shareholders.

130. The acts and omissions described herein constituted wilful, wanton and reckless breaches of the MCCA defendants' fiduciary duties to the MCCA shareholders, who were damaged thereby.

## COUNT VIII

## COMMON LAW INTENTIONAL AND NEGLIGENT MISREPRESENTATION

131. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

132. Defendants had a common-law duty to the MCCA shareholders to disclose all material facts concerning the Merger Agreement.

133. Through willful conduct and/or negligence, defendants failed to disclose all material information concerning the Merger Agreement and made representations and/or omissions that were false and misleading.

134. Defendants caused to be distributed the Proxy/Prospectus which contained material misrepresentations and omissions for the purpose and with the affect of inducing the MCCA shareholders to approve the Merger Agreement. A majority of MCCA shareholders relied on the Proxy/Prospectus and as such were induced to approve the Merger Agreement.

135. As a result of defendants' concealment, the members of the MCCA Shareholder class had no knowledge of defendants' omissions or of any facts which might have lead to the discovery thereof. The MCCA shareholders could not have discovered this deception by the exercise of due diligence since the same had been fraudulently concealed by the defendants by various means and methods designed to avoid detection.

## COUNT IX

## VIOLATIONS OF SECTION 14(a) OF THE EXCHANGE ACT AND RULES 14a-5 AND 14a-9

136. Paragraphs 1 through 107 are hereby incorporated herein as though fully restated and realleged.

137. Defendants, by the use of the mails and by the means and instrumentalities of interstate commerce and the facilities of national securities exchanges and otherwise, mailed the Proxy/Prospectus and solicited proxies from shareholders of MCCA.

138. Defendants encouraged, cooperated, acquiesced, assisted and participated in the preparation and distribution of

the Proxy/Prospectus and thus were in violation of Section 14(a) of the Exchange Act and rules 14a-5 and 14a-9 promulgated thereunder in that the Proxy/Prospectus contained untrue statements of material fact and omitted to state material facts necessary in order to make the statements made in light of the circumstances under which they were made not misleading.

## PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for judgment against defendants as follows:

(1) Declaring this to be a class action on behalf of the MCCA shareholders as to all counts;

(2) Awarding Plaintiffs and other members of the class:

(a) compensatory damages in an amount per share of MCCA and Mtel equivalent to the difference between the compensation received pursuant to the Merger Agreement and the fair market value of the MCCA and Mtel shares as of the Effective Date of the Merger, which damages total at least $850,000,000;

(b) at least $2.55 billion, representing treble the amount of damages suffered from the violations of 18 U.S.C. § 1962;

(c) their costs and expenses, including reasonable attorneys' fees;

(d) punitive damages on the common law claims for willful, wanton and reckless misconduct;

(e) Awarding such other and further relief as may be deemed by this Court to be just, equitable and

appropriate.

Dated: New York, New York
February 15, 1990

SAUL, EWING, REMICK & SAUL

By: /s/
A Member of the Firm
222 Delaware Avenue
P.O. Box 1266
Wilmington, Delaware 19899-1266
(302) 654-1413

PATTERSON, BELKNAP,
WEBB & TYLER

By: /s/
A Member of the Firm
30 Rockefeller Plaza
New York, New York 10112
(212)698-2500

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of March, 1990, two copies of the foregoing Amended Class Action Complaint were served by hand upon local counsel for the parties, as shown below:

Jesse A. Finkelstein, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

Thomas R. Hunt, Jr., Esquire
Morris, Nichols, Arsht & Tunnell
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19801

/s/
Jeffrey S. Goddess
Saul, Ewing, Remick & Saul
222 Delaware Avenue
P.O. Box 1266
Wilmington, DE 19899
Attorney for Plaintiffs

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC. CONSOLIDATED LITIGATION | ) | No. 69, 1991 |
| | ) | Court Below: |
| | ) | Court of Chancery |
| | ) | of the State of |
| | ) | Delaware in and |
| | ) | for New Castle |
| | ) | County C.A. Nos. |
| | ) | 10627, 10638, |
| | ) | 10644, 10656, and |
| | ) | 10697 |

Submitted: October 16, 1991
Decided: February 4, 1992

Before CHRISTIE, Chief Justice, HORSEY and WALSH, Justices.

ORDER

This 4th day of February, 1992, the Court having considered the briefs of the parties and their contentions at oral argument, and having concluded that the judgment of the Court of Chancery should be affirmed on the basis of and for the reasons stated by the Court of Chancery in its well-reasoned Memorandum Opinion dated January 7, 1991 and Order and Final Judgment dated February 6th, 1991;

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and the same hereby is, AFFIRMED.

BY THE COURT:

/S/
Justice

**IN THE COURT OF CHANCERY**
**OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., CONSOLIDATED LITIGATION | ) | Civil Action Nos. 10627, 10638, 10644, 10656, 10697 |

## ORDER AND FINAL JUDGMENT

On this 6th day of February, 1991, a hearing having been held before this Court to determine whether the terms of the Stipulation and Agreement of Compromise and Settlement, dated June 6, 1989 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto,and all such transactions taken as a whole, are fair, reasonable and adequate for the settlement, compromise and discharge of the Settled Claims, as described in the Stipulation; and whether judgment should be entered in the above-referenced Civil Actions No. 10638, 10644, 10656 and 10697 (the "Shareholder Actions") dismissing the Shareholder Actions on the merits with prejudice as against the plaintiffs and all holders of Class A or Class B Common Stock of defendant Mobile Communications Corporation of America ("MCCA") as of the close of business on July 20, 1988 and their successors in interest or transferees, immediate and remote; and whether judgment should be entered in the above-referenced Civil Action No. 10627 (the "BellSouth Action") dismissing the BellSouth Action as moot; the Court having considered all matters submitted to it in the Actions at the hearing and otherwise; the Court having rendered its decision of January 4, 1991, as revised January 7, 1991 (the "Opinion"); and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to each shareholder of Class A and B Common Stock

of MCCA appearing on the stock books or records of the Transfer Agent as of the close of business on July 20, 1988 until and including April 4, 1989, as shown by the stock books or records of the Transfer Agent at the respective addresses set forth in such records; and that MCCA has used reasonable efforts to give notice to all beneficial owners of such securities.

NOW, THEREFORE, IN ACCORDANCE WITH THE OPINION AS SUPPLEMENTED IN PARAGRAPH 2 HEREOF, IT IS HEREBY ORDERED that:

1. The Class provisionally certified in this Court's Order dated October 7, 1989 is hereby permanently certified pursuant to Rules 23(b)(1) and 23(b)(2) of the Court of Chancery Rules. Plaintiffs Monahan and Wolf are designated as representatives of the Class, pursuant to the Stipulation.

2. The Stipulation and Settlement and all transactions referred to therein or preparatory or incident thereto,and all such transactions taken as a whole, are approved as fair, reasonable and adequate, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation; provided, however, that in lieu of the proposed $4,700,000 contribution to the capital of Mobile Telecommunications Technology Corporation ("Mtel") by MCCA, BellSouth shall distribute said sum in the form of BellSouth Common Stock in accordance with the existing terms and provisions set forth in paragraph 2 of the Stipulation for the distribution of BellSouth Common Stock, with the additional provision that the Exchange Agent shall make only one distribution in accordance with the terms and provisions of the Stipulation and not two separate distributions. For purposes of determining the number of shares of BellSouth Common Stock to be distributed in lieu of the proposed $4,700,000 capital contribution by MCCA to Mtel, the value of BellSouth Common Stock is determined to be that value equal to the average of the New York Stock Exchange

Composite closing prices of BellSouth Common Stock for the ten trading days prior to the date this Settlement becomes final under the terms of the Stipulation.

3. The Shareholder Actions (including complaints and counterclaims) are hereby dismissed on the merits as to all defendants and with prejudice as against plaintiffs in the Shareholder Actions and all members of the certified class, without costs except as provided in the Stipulation, such dismissal being subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation. The obligations under the Stipulation as modified in paragraph 2 hereof shall be in full settlement, compromise, release and discharge of the Settled Claims, and no Released Party, as defined in the Stipulation, shall have any other or further liability or obligations to anyone with respect to the Settled Claims except as expressly provided in the Stipulation as modified in paragraph 2 hereof.

4. The attorneys for plaintiffs Marshall Wolf and Regina T. Monahan are hereby awarded the sum of $995,000 in fees inclusive of disbursements, which sum the Court finds to be fair and reasonable and which shall be paid to said attorneys by MCCA from its own funds and without contribution or reimbursement from BellSouth in accordance with the Stipulation. As provided in Paragraph 8 of the Stipulation, interest shall accrue on said sum at the rate of 10% per annum from the date of entry of this Order and Final Judgment until the date of payment by MCCA.

5. Jurisdiction is hereby reserved over all matters relating to the administration and consummation of the terms of the Stipulation and the payment of attorneys' fees and expenses.

6. The BellSouth Action (including complaints and counterclaims) is hereby dismissed as moot.

/S/_____

Chancellor

CONSENTED TO:

MORRIS, ROSENTHAL, MONHAIT
& GROSS, P.A.

By:/S/_____

First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899

On Behalf of the Class

RICHARDS, LAYTON & FINGER

By:/S/_____

One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

On Behalf of Defendants Mobile Telecommunications Technologies Corp., Salvatore J. Albano, Xavier W. Nady, John N. Palmer, Thomas E. Barksdale, R. Fraser Triplett, E. Lee Walker, and C. Victor Raiser II

MORRIS, NICHOLS, ARSHT & TUNNEL

By: /S/_____

P.O. Box 1347
1105 N. Market Street
Wilmington, Delaware 19899

On Behalf of Defendants BellSouth Corporation
and Mobile Communications Corporation of America

**IN THE COURT OF CHANCERY**
**OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., CONSOLIDATED LITIGATION | ) | Civil Action Nos. 10627,10638, 10644, 10656, 10697 |

**MEMORANDUM OPINION**

| | |
|---|---|
| Date Submitted: | January 18, 1990 |
| Date Decided: | January 7, 1991 |

Joseph A. Rosenthal, Esquire, of MORRIS, ROSENTHAL, MONHAIT & GROSS, P.A.., Wilmington, Delaware; Richard Bemporad, Esquire, of LOWEY, DANNENBERG, BEMPORAD, BRACHTLE & SELINGER, P.C., New York, New York; William Klein, II, Esquire, of TENZER, GREENBLATT, FALLON & KAPLAN, New York, New York; Attorneys for Plaintiffs Regina T. Monahan and Marshall Wolf.

Jeffrey S. Goddess, Esquire, of SAUL, EWING, REMICK & SAUL, Wilmington, Delaware; David F. Dobbins, Esquire, Richard Savage, Esquire, Blair Axel, Esquire and Frederick S. Mandler, Esquire, of PATTERSON, BELKNAP, WEBB & TYLER, New York, New York; Attorneys for the Non-settling Plaintiffs, Sander Associates, L.P., McCarthy, Fleck, Fleck and Mirman.

Thomas Reed Hunt, Jr., Esquire of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Warren R. Stern, Esquire, and Andrew C. Houston, Esquire, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York; Attorneys for Defendant BellSouth Corporation.

Jesse A. Finkelstein, Esquire, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Thomas F. Cullen, Jr., Esquire, Kevin D. McDonald, Esquire and Deana B. Janab, Esquire, of JONES, DAY, REAVIS & POGUE, Washington, D.C.; Attorneys for Mobile Communications Corporation of America, Inc.

ALLEN, Chancellor

Pending is a motion under Rule 23(a) to approve a proposed settlement of this stockholder class action litigation and to release related class claims currently pending in the United States District Court for the District of Delaware.

The lawsuits at issue arose out of a merger, initiated in early 1988 and completed in 1989, in which all of the stock of Mobile Communications Corporation of America ("MCCA") was acquired by a wholly-owned subsidiary of BellSouth Corporation ("BellSouth") in exchange for BellSouth stock worth approximately $710 million. Plaintiffs have alleged, among other things, that, in light of takeover speculation in cellular telephone stocks that was occurring at the time of the closing of the merger, the price paid by BellSouth was woefully inadequate and that MCCA's board of directors breached its fiduciary duties to the MCCA shareholders in failing to exercise a right that plaintiffs argue MCCA had under the merger agreement with BellSouth to terminate that agreement. Plaintiffs also assert (1) that, in soliciting shareholder approval of the BellSouth merger, MCCA and the individual defendants who serve as its directors, breached duties of candor in allegedly failing adequately to explain the meaning and ramifications of the provision of the merger

agreement dealing with MCCA's right to terminate the merger agreement and (2) that the sale to BellSouth represented the culmination of a scheme to sell the MCCA assets to BellSouth at a bargain price. This latter claim is recast as a RICO claim[1] in federal litigation subsequently filed by certain of the plaintiffs in these cases.

On March 16, 1989, plaintiffs moved for a preliminary injunction against the closing of the proposed merger, asserting that the board of MCCA had, under the merger agreement, the legal right and, under fiduciary duty concepts, the duty, to terminate the merger agreement. This application was premised on plaintiffs' belief that the market value of companies in the cellular phone business (MCCA's principal business) had risen very appreciably since the February 19, 1988 date of the execution of the BellSouth merger agreement and that a much higher price could be realized from the sale of the company if terms of the merger could be negotiated in the then-current market. The court declined to issue such an injunction, concluding, albeit preliminarily, that the merger agreement did not, in the circumstances, afford to MCCA a right to terminate the agreement and concluding also that the proxy materials accurately disclosed the narrow and technical matter that had come to plaintiffs to appear critically important. In re Mobile Communications Corp. Cons. Litig., Del. Ch., Cons. No. 10627, Allen, C. (Mar. 29, 1989).

On a motion for interlocutory appeal of the denial of the request to prevent the effectuation of the merger, the court, having seen by that time a large number of applications to enjoin transactions affecting corporate control, [2] candidly stated

---

[1] The Racketeering Influenced Corrupt Organizations Act, is codified at 18 U.S.C. §§ 1962(a)-(d).

[2] See, e.g., AC Acquisition Corp. v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103 (1986) (granting injunction); City Capital Assocs. Ltd. v. Interco, Inc., Del. Ch., 551 A.2d 787 (1988)

an evaluation of the strengths of the central claims asserted in these cases:

> Frankly, I found that the case presented last week was one of the weakest cases legally for the issuance of a preliminary injunction that I have ever encountered in the court.
>
> * * * *
>
> Well, with respect to that aspect of the claim, the probability of success, I have already been as candid as I can be, and more candid than the plaintiffs would care for me to be in telling you that I don't think there is much to this case legally once you get past the practical fact that the plaintiffs may feel that there is more money out there if somebody would just be free to go and look for it.

Transcript of Apr. 3, 1989, at 27, 29-30. The Delaware Supreme Court denied interlocutory appeal of the denial of the application for preliminary injunction.

Shortly before the preliminary injunction hearing, on March 24, 1989, the parties opened settlement negotiations. At that time all of the plaintiffs participated in the discussions. After the preliminary injunction hearing, on March 30, settlement negotiations recommenced. Only the Wolf and Monahan plaintiffs chose to participate. On April 1, settling plaintiffs reached an agreement in principle on settlement

---

(same); USI, Inc. v. Walbro Corp., Del. Ch., No. 9323 (Oct. 6, 1987) (same); Solash v. Telex Corp., Del. Ch., No. 9518, Allen, C. (Jan. 19, 1988) (denying injunction); TW Services, Inc. v. SWT Acquisition Corp., Del. Ch., No. 10427 (Mar. 2, 1989) (same); In re Fort Howard Corp. Shareholders Litig., Del. Ch., No. 9991, Allen, C. (Aug. 8, 1988) (same); In re J. P. Stevens & Co., Inc. Shareholders Litig., Del. Ch., §42 A.2d 770 (1988) (same).

although the details were not finalized until June 6. The Delaware Supreme Court denied certification of an appeal on April 4. The merger was accomplished that same day. Discovery, which began in early March, continued into January of 1990. This settlement was presented for this court's approval on January 18, 1990.

In brief, the proposed settlement offers in the range of $35 million in cash and BellSouth stock in exchange for the release of all claims, state and federal, that might arise out of the transactions leading up to and including the Bellsouth acquisition of MCCA. The settlement also contemplates the payment of $995,000 in legal fees to plaintiffs' counsel.

Settling plaintiffs warmly endorse this settlement as an advantageous deal by which MCCA shareholders as of the time of the merger receive substantial benefit in exchange for the release of essential weak claims. The non-settlement plaintiffs (sometimes called "objectors") object to the settlement. They claim, inter alia, that damage in excess of two billion dollars might be achieved here and that the proffered settlement is wholly inadequate.

I.

The following is a summary of the facts of this case, as they appear in the records.

The parties

Regina T. Monahan and Marshall Wolf (collectively, the "settling plaintiffs" or the "settlers") were holders of MCCA common stock at the time of the BellSouth merger. Monahan owned only 50 shares of MCCA stock; Wolf owned 3,000 shares. Aaron Fleck, Sandler Associates, L.P., and Daniel Mccarthy (collectively, the "non-settling plaintiffs" or the "objectors") together, owned over 800,000 shares of

common stock at the time of the merger.[3] The non-settling plaintiffs object of the proposed settlement as inadequate and thus unfair.

Prior to its merger with a BellSouth subsidiary, MCCA was a Delaware corporation with its executive offices in Jackson, Mississippi. MCCA provided mobile telecommunications services in more than 100 cities throughout 34 states, the District of Columbia, and the U.S. Virgin Islands.

Mobile Telecommunications Technology Corp. ("Mtel") is a Delaware corporation that was incorporated on October 21, 1988, to succeed to the business and assets of COM/NAV Marina, Inc. ("COM/NAV"), than a wholly-owned subsidiary of MCCA. On April 4, 1989, in contemplation of the merger effectuated that day, the stock of Mtel was distributed to the MCCA stockholders on a share-for-share basis.

BellSouth is a holding company for various subsidiaries, including South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company which principally provide tariff telecommunications services and products to customers in several states. BLS Acquisition Corporation I, Inc., is a Delaware corporation and a wholly-owned subsidiary of BellSouth that was formed to facilitate the acquisition of MCCA.

Salvatore J. Albano, Thomas G. Barksdale, Xavier W. Nady, John N. Palmer,[4] C. Victor Raiser, R. Faser Triplett, and E. Lee Walker were directors of MCCA during the relevant

---

[3] At the time of the merger, there were 12,002,230 shares of MCCA Class A common stock and 11,599,164 shares of Class B common stock outstanding.

[4] The Flack and Sandler lawsuits name Nelson Palmer as defendant. I assume this is a reference to John N. Palmer.

period. John Hamon is also named as a defendant in the Flack and Sandler lawsuits, but it is unclear from the record whether he was a director at all relevant times.

Background of the merger agreement

MCCA was a company built from virtually nothing into a large cellular communications company, largely by its founder and chief executive officer, John Palmer. Palmer founded the company in 1965. Over the period 1975-1989, MCCA enjoyed explosive growth but had huge needs for capital.

The business relationship between BellSouth and MCCA predated the merger agreement that underlies this case. In February 1986, MCCA and BellSouth executed a Stock Purchase Agreement, pursuant to which BellSouth agreed to buy and MCCA agreed to sell MCCA common stock (class A and B), representing approximately 15% of the voting power of MCCA's then outstanding common shares. In return, MCCA received an equity infusion of over $40 million. Also on that date, BellSouth contracted to acquire a 50% interest in MCCA's subsidiary that held its cellular radio telephone operations.[5] Pursuant to this acquisition, BellSouth undertook to finance any further cellular acquisitions by MCCA and to assume 99% of the losses from cellular operations until January 1, 1990, or until the capital accounts of MCCA and BellSouth became equal. BellSouth also acquired an option, exercisable in the event any third party acquired 50% of the voting power of MCCA without board approval, to buy the other 50% interest in the cellular telephone business. In addition, BellSouth was granted a right, exercisable in the event of an unsolicited offer for the acquisition of 12.5% or more of the voting power of MCCA not approved by a majority of disinterested directors, to acquire sufficient additional MCCA shares to increase its voting power to 30%.

---

[5] BellSouth's purchase of 50% interest in MCCA's cellular operations was completed on December 31, 1986.

The following year (1987), MCCA and BellSouth held preliminary discussions concerning a possible business combination; no agreement, however, was reached at that time.

On January 14, 1988, BellSouth delivered to MCCA a written offer to acquire MCCA's paging and cellular operations in a merger in which each share of common stock of MCCA would be exchanged for $24 of common stock of BellSouth. On January 25, 1988, MCCA issued a press release disclosing the BellSouth proposal. Subsequently, MCCA received several inquiries from other potential bidders. On January 29, 1988, when BellSouth was advised by MCCA that it would be necessary for MCCA to explore expressions of interest from other parties, BellSouth withdrew its proposal, indicating that it would not continue negotiations under such circumstances.

Nevertheless, in early February 1988, MCCA invited all interested parties to participate in an "auction" of the company and set a deadline of February 19, 1988, for the submission of acquisition proposals. During the preceding weeks, MCCA's investment bankers, Prudential Bache, had been testing potential values for the company by discussing the potential sales of MCCA with possible purchasers. On February 19, BellSouth delivered a bid to purchase MCCA's paging and cellular operations for $28.75 of BellSouth common stock per share of MCCA common stock. The board received proposals from others as well, including McCaw Cellular Communications and Southwestern Bell.[6] The MCCA board met on that date to consider all offers received by the company. The board concluded that the BellSouth proposal provided the greatest value to MCCA's shareholders and that it was unlikely that a proposal at a higher price would be received in the then foreseeable future. A definitive merger agreement between the parties was executed the same day, and

---

[6] The Southwestern Bell offer was only for MCCA's paging assets. Southwestern Bell was in the process of locating a partner to purchase MCCA's cellular assets.

the 1986 Stock Purchase Agreement between MCCA and BellSouth was amended concurrently.

The merger agreement was contingent upon the receipt of certain regulatory approvals, as well as the receipt of certain regulatory approvals, as well as the receipt of a waiver from the United States District Court for the District of Columbia under a consent decree settling antitrust litigation against the former Bell System of which BellSouth had been a part. On August 24, 1988, the MCCA stockholders voted to approve the merger.

On January 19, 1989, as MCCA and BellSouth awaited the requisite approvals to consummate the merger, British Telecommunications agreed to purchase a 22% interest in McCaw Cellular Communications for $1.5 billion. Applying industry standards (value based on population covered by licenses), this transaction implied that a substantially higher value for MCCA could be realized in January, 1989, than had been negotiated in February, 1988, with BellSouth. The publicity surrounding the unexpectedly high price paid by British Telecommunications ignited a wave of speculation in the stocks of cellular companies, including MCCA. See In an Unusual Twist, Arbitrators are Hoping For a Disconnection in BellSouth-Mobile Deal, Wall St. J., Feb. 15, 1989, col. C2.

On February 16, 1989, counsel for the shareholder plaintiffs demanded to the MCCA board that it terminate the merger agreement pursuant to the MCCA board that it terminate the merger agreement pursuant to Section 9.01(f)(i) of that agreement and pay the termination fee required by Section 9.04 in order to enable the company to seek a higher price from another party. The following day, BellSouth filed suit in this court seeking a declaration that the MCCA board had no power to terminate the merger agreement under that section. Defendant MCCA and its directors responded by joining in the BellSouth request for declaratory judgment.

On February 21, 1989, the first of four purported class actions on behalf of MCCA shareholders was commenced. These actions were consolidated for expedited discovery. On Mach 28, following expedited discovery, plaintiffs sought a preliminary injunction against the MCCA-BellSouth merger pending final determination of the matters raised by the complaints.

Much of the argument at the hearing ont he request for a preliminary injunction focused on the interpretation of Section 9.01(f)(i) of the merger agreement. Plaintiffs asserted that under that section, the MCCA board was entitled to terminate the merger agreement, and that in failing to do so, the board was breaching its fiduciary duties. Plaintiffs asserted in the alternative that defendants' disclosure of the transaction in the proxy statement distributed to the MCCA stockholders in connection with their approval of the merger was inadequate and that the transaction represented a breach of so-called-called "Revlon duties." Plaintiffs' motion for injunctive relief was denied by the court in its seven-page order of March 29, 1989.[7]

The parties had opened settlement discussions on March 24 with all plaintiffs participating. These efforts were, of course, unavailing. Following the court's ruling on the application for preliminary injunction, those conversations recommenced on March 30. This time the non-settling plaintiffs refused to participate. The MCCA defendants were not present at the New York settlement negotiation but were apprised of the discussions.

The settlement agreement

---

[7] Non-settling plaintiffs' motion for an injunction pending appeal was denied by this court on April 3. The following day the Delaware Supreme Court denied non-settling plaintiffs' motion for certification of an appeal.

On April 1, following the ruling on the application for injunction pending appeal, settling plaintiffs and the defendants reached an agreement in principle to settle the action. Documents reflecting the agreement in principle were drafted and revised until June 6,[8] when the Stipulation of Settlement was executed by MCCA, Bell South, and the settling plaintiffs. This agreement would release defendants from all claims that might be asserted in connection with the negotiation or effectuation of the merger. In consideration for this release of all claims the agreement provides, inter alia, that:

> (i) Prior to consummation of the Mtel spin-off, MCCA would make an equity contribution of $18.3 million to Mtel, the former MCCA subsidiary that was spun-off to MCCA shareholders on the date of the merger;
>
> (ii) Following final judicial approval of the settlement, MCCA will make an additional capital contribution to Mtel of $4.7 million; and
>
> (iii) Following final judicial approval of the settlement, BellSouth will deliver up to 222,854 shares of BellSouth common stock (subject to downward adjustment based on the number of MCCA shares, if any, that sought appraisal) to an exchange agent for distribution, pro rata, to those persons or entities who received shares of BellSouth common stock in the merger.[9]

---

[8] On May 11, the non-settling plaintiffs were given the relevant documents, but again refused to participate in the settlement process.

[9] That stock had a market value at the time this settlement was submitted for approval of approximately $13 million.

The Stipulation of Settlement also provides that defendants will not object to an application for payment of fees and expenses by MCCA to settling plaintiffs' counsel, up to $995,000.

Subsequent events

Just prior to the Mtel spin-off, which occurred on April 4, 1989, BellSouth contributed the $18.3 million in cash to Mtel. The MCCA-BellSouth merger was also accomplished on that day.

On August 23, 1989, certain of the non-settling plaintiffs commenced a class action in the United States District Court for the District of Delaware. In addition to the breach of fiduciary claims asserted in this court, plaintiffs have alleged in the federal court claims under various provisions of both the Securities Act and the Securities Exchange Act and have asserted claims for treble damages under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1962(a)-(d).

Approval by this court of the Stipulation of Settlement would entail the dismissal with prejudice of the claims asserted and the release of all other claims arising from the facts alleged. Although the federal court is, of course, free to determine whether the release in question would be given a preclusive effect on the federal claims, see Kramer v. Chemical Constr. Corp., 456 U.S. 461, 481-83 (1982), I assume for purposes of analysis that approval of the Stipulation of Settlement's release of the federal claims would result in dismissal of the federal claims as well. See Nottingham Partners v. Trans-Lux Corp., C.A. No. 88-0591-2, 1990 U.S. Dist. LEXIS 8078 (D. Mass. June 27, 1990).

II. The Legal Test

The law favors settlements, See Nottingham Partners v. Dana, Del. Supr. 564 A.2d 1089, 1102 (1989); Rome v.

Archer, Del. Supr. 197 A.2d 49, 52 (1964), and this favor extends to class actions when the settlement represents a fair compromise.

A court's role in deciding whether to approve a proposed settlement of a class or derivative action is to determine whether, considering all the circumstances, the proposed agreement represents fair and reasonable compensation for the claims to be released. It is not necessary or desirable to decide any of the issues of the suit on the merits. Polk v. Good, Del. Supr. 507 A.2d 531, 536 (1986). What is called for is a review of the record and an evaluation of the value of the claims given the evidence developed and the applicable law. The court must attempt to place itself in the position of the absent class members, and make a practical judgment considering all of the factors that would affect a litigant's decision to settle a claims: delay, risk, expense, value of settlement consideration, etc. Here, I conclude that based on such consideration the proposed settlement is fair and reasonable to the class and will be approved, if modified in one particular described below.

III. The Claims Sought to be Released

1. Plaintiffs' fiduciary duty claims relating to the language of the merger agreement

At the injunction stage, plaintiffs asserted that the MCCA directors' fiduciary duty to the MCCA shareholders required the board to terminate the Merger Agreement and that failure to do so constituted a breach of that duty. The directors' right to terminate the Merger Agreement, argued plaintiffs, could be found in Section 9.01(f)(i) of that agreement which states:

Termination of the Merger Agreement

> The Merger Agreement may be terminated and the Merger abandoned at any time prior to the Effective Time, whether before or after the approval by the stockholders of [MCCA] . . . . (f) by [MCCA] if its Board of Directors in the exercise of its good faith judgment based upon the advice of counsel as to its fiduciary duties to the [MCCA] stockholders determine to (i) withdraw its recommendation that the MCCA stockholders approved the Merger Agreement or (ii) merge with, liquidate into or otherwise combine with any third party or enter into an agreement to do any of the foregoing; provided that, in either event, BellSouth shall have received $25 million in cash as a termination fee prior to such termination. (emphasis added)

It was my opinion at the time of the preliminary injunction application, and remains so now, that the right of termination created by Section 9.01(f)(i) expired by its own terms once an affirmative shareholder vote on the merger occurred. Specifically, that subsection provides for termination of the agreement only through the board's withdrawal of its recommendation of the merger to the company's shareholders (which recommendation is a necessary part of a merger vote, see 8 Del. C. § 251(b)). While it is permissible under Section 251(d) of the General Corporation Law for an agreement of merger to provide for the board to have the power to abandon a merger after the shareholders have approved it, this agreement contained no such provision. Section 9.01(f)(i) is much narrower. Its language is inconsistent with the board retaining power to abandon the transaction in the exercise of its unfettered judgment, after shareholder approval. The introductory language of Section 9.01 -- "before or after shareholders approval" -- does not create an ambiguity in my opinion; that phrase contemplates a number of contexts covered by subparagraphs (a) through (f) some of which might occur after a shareholder vote. Subparagraph (f)(i) itself,

however, is incapable of occurring after a shareholder vote. It is, in my opinion, unambiguous.

Even were plaintiffs' interpretation of Section 9.01(f)(i) correct, however, in order to establish that the MCCA board was entitled to terminate the merger agreement after shareholder approval of it, plaintiffs would have to prove that counsel advised the board that its fiduciary duty required the board to terminate the agreement. But indisputably the MCCA board was advised by its legal counsel that MCCA had no right under Section 9.01(f)(i) to terminate the agreement in the circumstances.[10] Thus, I conclude that this central claim is quite weak.

2. The disclosure claims
under state and federal law

The settlement, if approved, would release all disclosure claims -- state or federal -- arising from this course of conduct, principally arising from the proxy statement. Under both federal and state theories, the principal point involves the asserted failure to explain the meaning or understanding of the meaning of Section 9.01(f).[11]

---

[10] Given the view of the law expressed above, it would be impossible to credit any suggestion that, in concluding that MCCA had no right to terminate the merger agreement under Section 9.01(f)(i), its legal counsel was in fact conspiring with the directors in a (hypothetical) desire to sell the company for less than the best achievable price.

[11] Also possible are claims that defendants did not disclose that they were scheming to favor BellSouth, but those need not be treated as they are plainly the sort of confessional points consistently held to not state a claim. See, e.g., Edelman v. Salomon, 559 F. Supp. 1178 (D. Del. 1983); Seibert v. Harper & Row Publishers, Inc., Del. Ch., No. 6639, Berger, V.C. (Dec. 5, 1984); Weinberger v. United Financial Corp., Del. Ch., No. 5915, Hartnett, V.C. (1983).

The question on this theory then is whether the proxy materials failed to fairly convey the terms of the merger or whether they were misleading or inaccurate in any material respect concerning rights to terminate after the vote.

The proxy statement, in describing Section 9.01(f)(i) essentially paraphrases the Merger Agreement which itself is appended to the proxy statement. While paraphrasing the terms of an agreement may be insufficient to satisfy disclosure obligations if the terms themselves are unclear or ambiguous, see Lafer Amster & Co. v. Stone Container Corp., 690 F. Supp. 1356 (S.D.N.Y. 1988), I do not read Section 9.01(f)(i) or any paraphrasing thereof in the proxy statement as ambiguous. That provision is not misleading, in my mind, because I cannot imagine any reasonable interpretation that would lead one to conclude that the MCCA board could terminate the agreement by withdrawing its recommendation to the stockholders after the stockholders have already voted to approve the merger agreement. The common and accepted meaning of the term recommend is "to present as worthy of acceptance. . . ." Webster's Ninth New Collegiate Dictionary (1988). It is contrary to that common meaning of the word to conclude that a "recommendation" may effectively be "withdrawn" after the recommendation has been acted upon.

This construction is buttressed by the proxy statement's description of how such a "withdrawal" of the "recommendation" would work: MCCA would notify BellSouth that it was obliged to "withdraw its recommendation that the Merger be approved by the MCCA stockholders and to cease soliciting proxies to approve the Merger Agreement." Thus, the proxy statement itself directly linked termination by "withdrawal of recommendation" to the proxy solicitation period, that is, the period prior to stockholders' approval.

The lack of ambiguity in this proxy statement is precisely what differentiates this case from Lafer Amster, cited above. Although denying summary judgment whether there was an apparently ambiguous prospectus, that court indicated

that it might be persuaded to do otherwise if it were later demonstrated that "only one commercially reasonably meaning [could] be described to the provision." Lafer Amster, 690 F. Supp. at 1360.

Furthermore, federal securities laws impose no duty to provide legal opinions with respect to the operation and effect of Section 9.01(f)(i). See Umbriac v. Kaiser, 467 F. Supp. 548 (D. Nev. 1979). This case is in some respects similar to Umbriac v. Kaiser. In that case, the court characterized as frivolous an allegation that a proxy statement was required to explain the legal distinction between "distribution" and "disposition." Id. at 552 n. 3. I cannot conclude that non-settling plaintiffs' argument that the MCCA proxy statement was required to explain the legal distinction between "withdrawal of recommendation" and "termination" is any more meritorious. Accordingly, I do not regard the central disclosure claim as a strong one.

3. Claims arising from the merger negotiation process

Among the claims to be released (and thus appraised here) are claims that the process by which MCCA got itself into the merger agreement (which, of course, limited its options once the market for stock of companies in its industry appeared to rise substantially - see p. 9, supra) itself involved wrongs to the shareholders. The principal theory here available to plaintiffs is some variant of a state fiduciary duty on sale of the company theory. The alternative conceptualization offered by non-settling plaintiffs in their federal litigation is a criminal conspiracy (RICO) claim. Both theories must view the 1986 agreement (pp. 6-7, supra) and the 1988 "auction" as pretexts for an undisclosed effort to do a sweetheart deal.

(a) state theories At the preliminary injunction hearing the non-settling plaintiffs urged that in arranging the sale of MCCA to BellSouth, MCCA's directors violated their

duties under Revlon, Inc. v. MacAndrews & Forbes Moldings, Inc., Del. Supr., 506 A.23d 173 (1986). This argument includes the assertion that the agreement between MCCA and BellSouth in 1986, as well as the no-shop and termination provisions of the Merger Agreement, improperly deterred any other bidder from offering to purchase the company. Without delving into the merits of this claim very deeply, suffice it to say that the so-called Revlon claim seems also to be a very weak one. Nothing in the record suggests any bad faith or negligence by the MCCA board in approving the transactions between the company and BellSouth. Sea Barkan v. Amsted Industries, Inc., Del. Supr., 567 A.2d. 1279, 1286-87 (1989); Citron v. Fairchild Camera & Instrument Corp., Del. Ch., No. 6085, Allen, C. (May 19, 1988) aff'd, De. Supr., 569 A. 2d 53 (1988). Moreover, it is quite unlikely that one could be led to conclude that the MCCA board acted unreasonably in the circumstances of this series of agreements. Sea Mills Acquisition v. Macmillan, Inc., Del. Supr., 559 A.2d 1261, 1288 (1989). Indeed, I am impressed, as I was at the preliminary injunction stage, by the apparent independence of the board with respect to this transaction. The substantial stockholdings in the company by the MCCA directors, most notably John Palmer, the founder of MCCA and its chairman and chief executive officer, created powerful economic (and psychological) incentives to get the best available deal in the sale of MCCA. The MCCA board had enormous incentive to maximize shareholder value and this incentive does not appear to have been materially offset by other economic interests, specifically the CEO's role as CEO of the Mtel spin-off. Thus, reviewing the evidence in the file and the strengths and weaknesses of the legal arguments available to each side, I conclude that plaintiffs bare had a very weak case for breach of fiduciary duty.

(b) federal law theory These same events are repackaged by non-settling plaintiffs in its later filed RICO case in the United States District Court. In my view, that claim is even weaker than the state breach of fiduciary claims. In deed, I entertain doubts that it might not be frivolous or

irresponsible, given the record discovery as of the August, 1989 filing of the District Court action, to characterize this series of business transactions between unrelated parties as a criminal conspiracy.

The RICO claims asserted by non-settling plaintiffs in their federal complaint allege that defendants conspired to sell MCCA to BellSouth at a price below its actual value in consideration of which the MCCA director defendants would receive employment benefits in a control of Mtel. The objectors allege that this "conspiracy" began with the 1986 Stock Purchase Agreement and continued up to the merger, supported by acts of mail and wire "fraud."

These claims appear wholly insubstantial. First, RICO liability requires a finding of some criminal or fraudulent activity. See 18 U.S.C. $ 1961 (1979). As indicated above, the record here suggests nothing illegal, criminal, or fraudulent about the 1986 Agreements, the option and voting rights granted in connection with the Merger Agreement, or the conduct of the directors in negotiating, approving and effectuating the Merger Agreement. Each of these acts appears to reflect valid business judgments. That leaves only the proxy statement as a potential source of criminality or fraud. I am unable to see much likelihood that that document was misleading or fraudulent. But even assuming that the proxy statement were deceptive, that fact alone could not support a valid RICO claim. RICO requires a "pattern" of illegal activity defined by statute to mean "at least two acts of racketeering activity" within a ten year period. 18 U.S.C. $ 1961 ($). The United States Supreme Court has interpreted "pattern" to mean that a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Telephone Co., _____ U.S. _____, 109 S:

Ct. 2893, 2900 (1989) (emphasis added);[12] see also Marshall-Silver Constr. Co. Inc. v. Mendel, 894 F. 2d 593, 597 (3d Cir. 1990). (Since "Congress was concerned in RICO with long-term criminal conduct in the future"). In this case, I am wholly unpersuaded that any such threat exists.

Moreover, in order to establish any violation of the mail and wire fraud provisions of RICO, objecting plaintiffs must demonstrate that defendants (most importantly Mr. Palmer, who was deposed twice) acted with specific intent to defraud or made material misstatements with reckless disregard to truth or falsity of those statements. See In re Phillips Petroleum Securities Litig., 881 F. 2d 1236, 1249 (3d Cir. 1989).

* * *

In sum, I continue of the view that plaintiffs' have been driven by the fact that the market value of BellSouth cellular phone assets appeared to change very significantly between the date of the signing of the merger agreement and the closing of the merger. Understandably they want to capture some or all of that increase for themselves. But the

---

[12]Objectors cite M.J. Inc. for the proposition that a "single scheme can support (a) pattern of racketeering activity." This may well be the case. However, this language must be read in light of the qualifying "continued threat" language -- that is a single scheme can support racketeering charges only if there is some continued threat of criminal conduct. Moreover, the use of the term "scheme" is to be distinguished from the term "predicate" as used in the Supreme Court's opinion in H.J. Inc. The Supreme Court held that in enacting the RICO statute Congress "envision(ed) a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related to and that amounted to, or threatened the likelihood of, continued criminal activity." 109 S. Ct. at 2899. While a single scheme may be sufficient, this language makes clear that multiple predicates are required. In this case, if the proxy statement is in fact fraudulent, which, again, I do not believe to be the case, it would be but one predicate act.

corporation's contract did not give the board a broad "fiduciary out." I find no plausible evidence that this lack itself resulted from any wrong (scheme or innocent dereliction). Thus I see the cases principally as an attempt by shareholders to be excused from the market consequences of a legitimate contract that allocated risk. I do not see these cases as legally strong.

## IV. Non-Settling Plaintiffs' Objections

The non-settling plaintiffs assert that the consideration offered in exchange for release of all MCCA shareholders claims is inadequate and cannot be approved as fair. In support of this view they asset that (1) the settling plaintiffs had inadequate information about the merits of the claims proposed, to be released when they recommended approval of the settlement to the court and that they are actually motivated not to maximize class interests but to earn a handsome fee for the attorneys who represent them; (2) the consideration offered is inadequate in light of the huge damage claims they say might be proven; (3) the consideration is less than settling plaintiffs claim because (a) the $18.3 million cash payment to Mtel at the time of the spin-off cannot be counted as consideration for the release of claims because it would have been paid in all events; because it has already now been paid and is thus not contingent upon approval of the settlement; and because it is a payment to Mtel and not directly to class; (b) similarly, the $4.7 million payment to Mtel that is contingent on approval of the proposed settlement is to be made to Mtel and not to the class directly; and (c) the payment of 222,854 shares of BellSouth stock directly to the class is a payment that the directors could have secured without the settlement agreement and thus cannot be considered as consideration for the release of class claims. Non-settling plaintiffs also insist that they be afforded a right to opt-out of any settlement that may be approved and urge that, in all events, it is inappropriate in these actions to release their claims against the same defendants pending in the United States District Court.

### 1. The claim of bad faith or bad judgment

Objectors mainly contend that their claims have not been sufficiently investigated. From this base they sling two shots. First, they assert that only parties uninterested in the welfare of the class, and interested only in the welfare of the settling plaintiffs' lawyers, could have concluded to settle such large claims at so preliminary a stage. Second, aside from motivation, they say that neither counsel nor the court is in a position to responsibly assess the strengths and weaknesses of the claims and thus it would be imprudent to approve this settlement. I reject both claims. I find no basis to infer inappropriate, selfish motivation nor do I believe that the claims are so little developed that counsel and the court may not responsibly act at this stage.

Stockholder class actions are not infrequently attacked as too easily susceptible to abuse for the benefit of the lawyers who, in many instances, instigate and control them. Threats come from two opposite directions. First, valid or strong claims may be settled too cheaply as part of an implied bargain with defendants that assures plaintiffs' counsel that there will be no opposition to payment of a generous fee. The other threat of abuse threatens not class members but defendants. Weak or insubstantial claims, that are nonetheless not dismissible, may present an occasion in which a rational defendant (particularly one who is infrequently sued) may pay some settlement ransom (less than the expected cost of legally establishing its non-liability) in order to conclude the matter.

The purpose of Rule 23(e) and the hearing it contemplates is to create some protection against the first of these risks.[13] That protection is, of course, imperfect. The

---

[13] The second risk -- exploitation of defendants -- is not addressed formally in the law governing settlement of class action. Defendants in such suits are not situated differently than are other defendants with respect to this risk, except that the possibility of shifting the plaintiffs' attorneys' fees to the defendant probably increases the risk that attempts to exploit defendants will occur in that context. I suspect that some felt need to offer some protection

reaching of a settlement, whether in the context of a class action or not, involves a range of professional judgments, all of which will necessarily be made on imperfect information.

The question whether one knows enough about the merits of one's claim to responsibly consider and act on a proposed settlement is logically the first of these judgments.

The decision of the settling plaintiffs and their counsel to pursue negotiations at an early stage in these proceedings and to recommend that settlement to the court after certain discovery is questioned by the non-settling plaintiffs, but I can, in no event, see in what respect the course of the conduct of this litigation or the terms of the proposed settlement can legitimately support an inference that the settling plaintiffs and their attorneys were not proceeding in utter good faith. There doubtless are cases in which counsel's interest in earning a fee seems to have motivated a proposed settlement. In such instances this court has rejected the proposal. See Stepak v. Tracinda Corp., Del. Ch., No. 8457, Allen, C. (Aug. 18, 1989).

Here, in my opinion, the early stage at which negotiations occurred, far from supporting the sinister inference for which the non-settling parties contend, is readily explainable on sensible and proper grounds: plaintiffs had just been on the losing end of what could easily have been interpreted as a devastating denial of their injunction application. In denying the relief sought, the court used strong language directed towards plaintiffs' central theories. Matters remained to be discovered, of course, relating to the theory

---

to class action defendants from this risk accounts in part for the willingness of courts in practice to depart from the pure theory of notice pleading that the drafters of the Federal Rules of Civil Procedure had in mind and to assert in some instances, that a plaintiff must allege specific facts and not simply conclusions. See, e.g., Grobow v. Perot, Del. Supr., 539 A. 2d 180, 187 (1988). Compare Charles Alan Wright, Law of Federal Courts, § 68 at p. 285-87 (2d ed. 1970)

that the directors had not sought in good faith to maximize corporate interests in entering in to the merger agreement.[14] But the fact that more discovery remains to be done will always be true, unless of course the plaintiff is fully ready for trial. Moreover, settling plaintiffs had to face the following: (1) this was not an MBO transaction; (2) the company's founder had negotiated the transaction and all shareholders were treated equally; (3) the fact that Mtel was spun-off was explicably on good business grounds; (4) in the circumstances, a court was unlikely to view the fact that the CEO was going to continue to manage the Mtel business as a very significant conflict; and (5) whatever leverage they had to get something through settlement would never be greater than it was before the transaction closed. The inherent uncertainty that time entails meant BellSouth wanted to close as soon as all its conditions were satisfied and it would, no doubt, prefer to have reached a general settlement by closing (but could close without it).

Thus, there are good reasons for an early settlement agreement in this instance. The non-settling plaintiffs effort to make this substantial settlement reached at an early time seem to be a pretext for a side payment of legal fee, in my opinion, fails utterly.

2. The claim that the proposed consideration is inadequate

The proposed settlement contemplates payments by BellSouth in the range of $35 million in exchanged for the release of all claims of any kind that arise from the series of actions attached. Recognizing that objectors claim that their potential damages (calculated by reference to what they say might have been achieved in a market transaction that was

---

[14] Nonetheless the discovery taken in this case has been substantial. Plaintiffs took at least eight depositions before the preliminary injunction hearing. After the preliminary injunction stage, three more depositions were taken.

negotiated in April 1989) was on the order of $800 million and that under the RICO statute a treble damage award is available, I conclude that the proposal does constitute more than adequate compensation for the release sought.

In so concluding, I reject objectors' contention that, since the $18.3 cash payment to Mtel has already been paid, it cannot be weighed as consideration for a release of claims now. While parties who effectuate part or all of a settlement of a class action before court approval do risk a loss if the court should find the consideration contemplated by the settlement inadequate, there is no rule that absolutely requires that such payments await court approval. Compara Barkan v. Amsted Industries, Del. Supr., 567 A.2d 1279, 1284-85 (1989) with Chickering v. Giles, Del. Ch., 270 A. 2d 373, 375 (1970). Here, there appears sufficient reason to have proceeded with the payment.

I also reject the argument that the $18.3 million payment was in fact not paid in consideration of the settlement but was a payment that would have been made in all events. The record does not support that contention. Rather, it is more consistent with BellSouth's assertion that the $18.3 payment had never been agreed to prior to the settlement negotiations and that BellSouth agreed to the payment only in consideration of the termination of this litigation and the release of all claims.

Finally, I reject the notion that payment of this sum to Mtel rather than directly to the individual stockholders cannot count as consideration of those stockholders for purposes of release of claims. The payment to Mtel was made on the same day that the Mtel stock was spun-off to the MCCA shareholders. Thus, the benefit was indirectly realized by MCCA shareholders in the same proportion as their MCCA stock ownership. Objectors say that some class members must have sold their Mtel stock on the when-issued market prior to the spin-off, and if they did, those shareholders would not benefit from this part of the proposed consideration for the

release of claims. This is correct. The record, however, provides no way in which to evaluate how many of the MCCA shareholders did sell their Mtel stock prior to the spin-off. Indeed, I am not sure how that could be established since the number of shares traded in the when-issued market would not itself represent the number of MCCA spin-off shares sold; there are no doubt short-sellers in that market and even as to MCCA shareholders who sold rights in the when-issued markets, those rights could be resold one or more times.

Another factor that is pertinent to an evaluation of the importance of possible sales in a when-issued market is the possible injustice to defendants. Imagine (as I decide is, in fact, the case) that the package of cash and securities proposed does represent adequate and fair consideration for the release of claims. To now reject that settlement because some uncertain number of MCCA shares may have sold their rights to Mtel stock in the when-issued market before the spin-off would (a) give to all other former MCCA shareholders an unfair windfall and (b) at the same time deprive them of the remaining consideration offered in this settlement.

The court's obligation on this motion is to evaluate the overall fairness of the proposal. Having concluded that the consideration offered is quite fair, I cannot conclude that the possibility that some members of the class may not participate in all elements of the consideration fully because they sold their rights to Mtel stock disqualifies the proposed settlement from approval.

Objectors' argument has greater force when applied to the second element of the proposed consideration: the further $4.7 million cash infusion to Mtel. That payment is to be made only after court approval. Int his instance, we do not deal with the relatively small when-issued market, but rather with many months of trading in the market for Mtel stock itself. Any member of the class who sold during this lengthy

period will receive no direct benefit from this payment,[15] and any person who bought will benefit. There is no reason why this indirect form of compensation, with its obvious disadvantages, is necessary. It is plainly superior to compensate members of the class directly for the release of personal claims. Thus, with respect to this payment, I will require, as a condition of court approval, that this payment be made to class members directly rather than to Mtel.[16]

Finally, the objectors criticize the $13 million increase in the BellSouth stock to be paid to MCCA stockholders at the time of the merger. They argue that such an increase would have been paid pursuant to the Merger Agreement if the transaction had closed after April 10. The merger actually closed on April 4. Non-settling plaintiffs suggest that the MCCA board could have and should have delayed the closing of the merger, despite provisions in the merger agreement requiring prompt closing upon the fulfillment of all conditions precedent to the merger, until after april 10 in order to cause this "bump-up" provision to be triggered. Non-settling plaintiffs do not offer a suggestion as to how such a delay could be accomplished without violating MCCA's contractual obligation of good faith and fair dealing. Indeed, these parties appear to suggest that the board could have achieved this

---

[15] In reply to an argument that selling Mtel shareholders have already received this benefit in that their selling price reflected the prospect for this (contingent) future payment, one must say that the existence, in fact, of any such benefit or its amount was at the time of any such sale of stock so speculative as to form no basis for responsible judicial action.

[16] I recognize that Mtel might make profitable use of this cash infusion. But that fact does not justify, in these circumstances, an enforced investment by the class where the incongruence between class members and stockholders is as significant as doubtless is here.

benefit under the merger agreement by pretextual delays of closing. There obviously is no legal right to engage in such conduct, and this court can hardly discount (as I think I have been invited to do) the increased consideration to be received, on the basis that sharp practices might have achieved that same benefit.

That point aside, however, the objectors' argument ignores the purpose of setting the trigger date for the "bump-up" provision at April 10. The record date for receipt of the BellSouth quarterly dividend was April 10. Thus, if the merger was accomplished by April 10 the (former) MCCA shareholders would receive that dividend. If it was not the merger agreement provided for the "bump-up" in price equal to the amount of the dividend. Thus, under the merger agreement the MCCA shareholders were to receive either the bump-up or the dividend, but not both. Under the Stipulation of Settlement, the stockholders received both the bump-up and the BellSouth dividend. Thus, the $13 million bump-up does unquestionably represent additional value received in the settlement.

Accordingly, I reject most of objectors' arguments designed to reduce the apparent value of the consideration offered in the proposed settlement. I conclude that that consideration has a value to the class in excess of $34 million and is more than adequate compensation for the release of the state and federal claims (which, in most particulars, are essentially similar).

3. Objectors' position re:
certification under Rule 23(b)

The objectors assert that this action must, or in all events should, be certified under paragraph (b)(3) of Rule 23 and that therefore each shareholder must be afforded a right to opt-out of the settlement and litigate their individual claims. Settling plaintiff and defendants assert the action is correctly

certified under Rule 23(b)(1) and (2), as it provisionally has been.

Questions of this sort not infrequently come before our courts. See, e.g., Nottingham Partners v. Dana, Del. Supr., 564 A.2d 1089 (1989); Raskin v. Birmingham Steel Corporation, Del. Ch., No. 11365, Allen, C. (Dec. 4, 1990). Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief (injunction); because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages[17] (compare Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)); and because to litigate the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action.

The argument has been made that once a preliminary injunction is denied a (b)(2) action should be treated as a (b)(3) action because, practically speaking, damages are the likely remedy if plaintiff prevails. This argument has been rejected, in part, I suggest, because of concerns reflected in the second and third of the reasons stated above. See In re Amsted Industries,Inc., Litig., Del. Ch., No. 8224, Allen, C. (Nov. 3, 1986) aff'd, sub nom., Barkan v. Amsted Industries, Del. Supr., 567 A.2d 1279 (1989); Shreiber v. Hudson Petroleum Corp., Del. Ch., No. 8513, Hartnett, V.C. (Oct. 29, 1986). Objectors would revisit this question. They assert that this action is essentially legal, seeking money damages. Thus, they implicitly invoke the statement of the United States Supreme Court in Shutts, supra, that an opt-out right is constitutionally necessary where a court attempts to

---

[17] That is, if it comes to a damage calculation the measure will be a pro-rata portion of some figure that measures an "entirely fair price" that should have been paid or a market price that should have been achieved.

bind absent members[18] to a judgment concluding claims "wholly or predominately for money judgments." 472 U.S. at 811 n.3.

In addressing whether non-settling plaintiffs or absent class members must necessarily be afforded an opt-out right, one must consider not only the nature of the claims stated but also the nature of the claims to be released (here, including federal securities laws and RICO claims). See Raskin v. Birmingham Steel Corp., supra, at p. 34.

That the state law claims requires no opt-out right is established by Nottingham Partners and cases cited therein. With respect to the federal claims, I am also satisfied that they do not fall with Rule 23(b)(3) definition. The federal securities claims are most importantly claims of proxy violation. Such claims, if proven, will support the granting of equitable relief. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-88, 90 S. Ct. 616 (1970); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 391 (2d Cir.) cert. denied, 414 U.S. 910 (1973); Bertoglio v. Texas International Co., 472 F. Sup. 1017, 1021 (D. Del. 1979); In re Ceasars Palace Shareholders Litig., 360 F. Supp. 366, 392 (S.D.N.Y. 1973).

Thus, the federal claims as well as the state claims subject the defendants to threats of "inconsistent . . . adjudications . . . which would establish incompatible standards of conduct . . ." (Rule 23(b)(1)(A)) and, in both federal and state actions defendants have "acted . . . on grounds generally applicable to the class," making final equitable relief with respect to the whole class appropriate (Rule 23(b)(2)). This is not surprising; the Federal and state claims are essentially slightly modified legal theories applied

---

[18] Since the objectors are the non-settling plaintiffs, they are plainly before the court, having consented to this court's jurisdiction by filing suit here, and thus, the strict holding of Shutts, has no direct application here with respect to them.

to the same "wrongs." Neither the state nor the federal claims are class actions of the type that meld somewhat dissimilar individual claims together for efficient common adjudication, as contemplated by subsection (b)(3). Rather both sets of theories involve one set of actions by defendants creating a uniform type of impact upon the class of stockholders. The Constitution does not require (cf. Hansberry v. Lee, 311 U.S. 32 (1940)), nor do prudential considerations, in my opinion, command the granting of an opt-out right in stockholder actions attacking the propriety of director conduct in connection with a corporate merger. The propriety of director action should be adjudicated, if it is to be adjudicated, once with respect to all similarly situated shareholders.

4. Scope of the release

Non-settling plaintiffs assert that it would be inappropriate for this court to authorize the release of federal RICO and federal securities law claims, especially so with respect to Exchange Act claims which this court could not adjudicate. I will not revisit this subject now. See, e.g., Nottingham Partners v. Dana, Del. Supr., 564 A.2d 1089 (1989); see also TBK Partners Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); Abramson v. Pennwood Investment Corp., 392 F.2d 759 (2d Cir. 1968).

These cases and others establish that while a federal court in which a released claim is pending or is brought always remain free to adjudicate the effect of the release, it is within the in personam jurisdiction of a state court, in an appropriate case, to authorize the release of all claims, including exclusively federal claims. The efficient operation of our coordinated federal system requires such a result. What is essential is that the state court consider the value of the federal claims in determining that fair consideration for their release is proposed. I have tried to do so here. Those claims seem very similar to the state claims and subject to the same evaluation.

V. Attorneys' Fees

Finally, I add a note on the application of settling plaintiffs' for the award of an attorney's fee of $995,000, which is unopposed by defendants. Our law on this subject is well developed. See, e.g., Allied Artists Pictures Corp. v. Baron, Del. Supr. 413 A.2d 876 (1980); In re Anderson, Clayton & Co. Shareholders Litig., Del. Ch., No. 8387, Allen, C. (Apr. 14, 1988).

The application will be approved. The monetary benefit here achieved was substantial. Settling plaintiffs' lawyers are experienced with litigation of this kind and here made competent and knowledgeable judgments to achieve a beneficial result. They were aided in this by circumstances but knew enough to move quickly to achieve such advantage as the uncertainty of circumstances created. The application is wholly reasonable considering the benefit achieved, the time expanded, the contingent nature of the undertaking, etc.

* * *

The parties supporting the settlement should advise whether the adjustment to the $4.7 million cash payment called for the Stipulation of Settlement is acceptable to all signatories. In the event that it is, the settlement as thus modified will be approved as fair and reasonable to the class and the granting of the broad release negotiated will be approved.

**IN THE COURT OF CHANCERY**
**OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., CONSOLIDATED LITIGATION | ) ) ) | Consolidated Civil Action No. 10627 |

MEMORANDUM AND ORDER
DENYING MOTION
FOR PRELIMINARY INJUNCTION

Certain plaintiffs, shareholders of Mobile Communications Corporation of America ("MCCA"), having moved in these consolidated actions for an order preliminarily enjoining the closing of the transactions contemplated by that certain Agreement and Plan of Reorganization (the "Agreement") among MCCA, COM/NAV Marine, Inc. (now Mtel, Inc.), BellSouth Corporation and BLS Acquisition Corp. I, Inc. dated as of February 19, 1988; and

The court having considered the pleadings, depositions and affidavits filed in the matter together with the briefs and oral arguments of the parties,

It is hereby ORDERED, this 29th day of March, 1989, for the reasons set forth below, that such motion is denied.

I. The legal test applied on this application requires a discretionary judgment that considers the likelihood that the claims asserted will ultimately be sustained, the probability and extent of injury that it is claimed will befall plaintiffs prior to final hearing, the ability of the court to fashion an adequate compensatory award or equitable relief following trial, and any harm that may befall defendants or the

public as a result of granting the relief and that may not adequately be protected against by bond or otherwise. See, e.g., Ivanhoe Partners v. Newmont Mining, Del. Supr., 535 A.2d 1334 (1987). The basis of this decision is the conclusion that plaintiffs have demonstrated an insufficient likelihood of ultimate success on their claims to justify the preliminary relief they seek.

2. This case, as refined by the presentation of counsel at oral argument, presents at this stage principally a question of the adequacy of the disclosure made in the joint solicitation of proxies in connection with the MCCA shareholder approval of the Agreement. The test for the adequacy of such disclosure has generally been established in this State by Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929 (1985).

3. I thus pass over any claim of negligence that plaintiffs at one point seemed to advance. As to the good faith or motive of the board of MCCA, in connection with the negotiation of the Agreement, I note that the board appears completely independent with respect to this transaction and indeed appears very powerfully to have predominating economic interests in the transaction as shareholders of MCCA that are not materially offset by other economic interests. It is, however, the case that the independence (or good faith or due care) of a board is not directly relevant to a determination whether a disclosure obligation has been satisfied (disclosure not being a question of business judgment, see, e.g., Anderson Clayton Shareholders' Litigation, Del. Ch., 519 A.2d 669, 675 (1986)).

4. The disclosure charged here as being inadequate or misleading does not relate to a fact concerning the business or value of MCCA or of any other party to the Agreement. Nor does it relate to any of the economic terms of the transaction contemplated by the Agreement. It does relate to the provision of the Agreement governing the rights of the parties to termination under certain circumstances (Section

9.01).

5. The full Agreement was appended to the proxy solicitation materials. Those materials summarized the terms of the termination clause in several places. See pp. 6, 18 (with respect to the related ¶ 6 provision) and pp. 19-20. I conclude, on the preliminary basis a motion of this sort permits, that the defendants' interpretation of the scope and meaning of Section 9.01(f)(1) is likely to be sustained and that none of the disclosures made to shareholders reflect an inaccurate statement concerning the scope or meaning of that provision. Moreover, I conclude that the MCCA board has (or at least appears on the limited record now available to have) satisfied any obligation it may be thought to have, with respect to this matter, to give a fair summary of the particulars of the merger transaction.

6. The language of Rosenblatt v. Getty Oil, supra or that of the other cases defining the board's disclosure obligation, does not apply perfectly when the claimed "omitted fact," Rosenblatt 493 A.2d at 944, is not a fact concerning the business of the Company, but is actually a legal conclusion concerning the scope or meaning or effect of a negotiated provision in the merger agreement. Passing over this consideration, however, it is noted that plaintiffs claim that there is an "omitted fact." It is said to be either (a) the "fact" that the right of the MCCA board under Section 9.01(f)(1) of the Agreement to withdraw its recommendation of approval to shareholders became moot after, or did not survive, the shareholder vote itself, or (b) the fact that all of the signatories to the Agreement so construed Section 9.01(f). With respect to the first characterization of the "omitted fact," I note that if the legal conclusion is sound (i.e., MCCA does under the contract language lose the ability to "withdraw," etc. or the power to withdraw becomes legally moot after the stockholder vote approving the merger), which I am inclined to believe, it cannot be concluded that this condition, or conclusion or fact is "omitted" from the proxy materials. The text of the provision was provided; the summaries are not inaccurate even

if they are (at p. 6, but not pp. 19-20) very summary. With respect to the second characterization -- the notion that the parties had a secret (i.e., undisclosed) "agreement" of the kind asserted -- such a fact can hardly be thought in the least surprising to one who, upon reading the provision, shares that legal conclusion. Indeed, plaintiffs' argument at this point seems to come down to the claim that the parties ought to have disclosed that they each thought that the Agreement provides, with respect to termination rights, what the Agreement does appear to provide.

7. More sympathetically, plaintiffs may be thought to urge that a more expansive explanation of just how the termination clause might work before and after the stockholder vote was necessary in order for the board of MCCA to meet its obligation to the Company's shareholders who are not, this argument assumes, legally sophisticated. For purposes of this motion, I have not been persuaded that it is the case that a more accessible explanation was required by the directors' fiduciary duty. To hold otherwise would, I suppose, be an extension of Delaware law. I do not, at least in the context of this case, perceive such an extension as, on balance, helpful. Surely a legal rule that might cause shareholder votes to be better informed with respect to the scope and meaning of the non-economic terms of complex legal documents would, if it were otherwise costless, be a desirable rule. But how could such a requirement be articulated and what uncertainties would it create? Such a further requirement would come with substantial costs. Once a director's duty was held to extend beyond disclosing all material "facts" in the board's possession and beyond fairly explaining the material terms of the transaction in a technically correct way (as it appears was done here), one could never, before the fact, know with reasonable certainty just how accessible the explanation of complex legal transactions would have to be made. Proxy solicitations would grow ever more voluminous and, probably, less, not more, helpful.

8. Perhaps some shareholders believed

when they voted to approve the Agreement that a broad "fiduciary out" clause -- as broad as the first sentence of Section 251(d) of our corporation law statute -- was included in the termination clause negotiated. If they did, I am inclined to believe they made a mistake of law. I cannot conclude that the disclosure actually made led them to any such (assumed) mistake of law or, indeed, contributed to it in any way.

9. The disclosure here is altogether different from that treated in Anderson Clayton Shareholders' Litigation, Del. Ch., 519 A.2d 669 (1986), the case principally relied upon by plaintiffs. There, the board made statements to the shareholders -- either representations or untrue statements of present intent -- that would have been critical to a reasonable shareholder in those circumstances. See 519 A.2d at 677. Those statements appeared, at the time of the preliminary injunction application, to have either been false when made or deliberately not complied with by the board. Here, I cannot conclude that the disclosure with respect to the termination clause is incorrect (or false) in any material respect and, thus, I do not understand that authority as having any direct bearing upon this situation.

/S/

Chancellor

[Excerpt from pp. 19-20 of Proxy Statement Dated July 21, 1988:]

Termination of the Merger Agreement

The Merger Agreement may be terminated and the Merger abandoned at any time prior to the Effective Time, whether before or after the approval by the stockholders of MCCA: (a) by the mutual consent of MCCA and BLS by action of their respective Boards of Directors; (b) by either MCCA or BLS by action of their respective Boards of Directors if (i) the Merger shall not have become effective in accordance with its terms on or before the close of business on the first anniversary of the date of the Special Meeting subject to a one-year extension in the event that divestiture of any of MCCA's operations is required as a result of the failure to obtain any consent, approval, permit or authorization necessary to transfer control of such operations from MCCA to BellSouth; (ii) any court or governmental or regulatory authority has taken any action permanently and finally restraining, enjoining or otherwise prohibiting the consummation of the Merger; (iii) the stockholders of MCCA shall have voted at the Special Meeting and not approved the Merger Agreement, or (iv) the other party is in material breach under the Merger Agreement (each party having the right to notice of such breach or non-compliance and a 30-day cure period with respect thereto); (c) by the Board of Directors of BLS if MCCA gives to BellSouth a Notice or is obligated to provide BellSouth with a Notice and fails to do so; or (d) by MCCA if its Board of Directors, in the exercise of its good faith judgment based upon the advice of counsel as to its fiduciary duties to the MCCA stockholders, determines to (i) withdraw its recommendation that the MCCA stockholders approve the Merger Agreement or (ii) merge with, liquidate into or otherwise combine with any third party or enter into an agreement to do any of the foregoing, provided that, in either event, BellSouth shall have received $25 million in cash as a termination fee prior to such termination.

MCCA is required immediately to pay to BellSouth a fee of $25 million in cash upon the occurrence of both of the following events (a) BellSouth terminates the Merger Agreement as a result of its receipt of a Notice, or as a result of the failure of MCCA to give BellSouth a required Notice, and (b) if, at any time prior to or within two years after such termination, any third party (i) enters into an agreement with MCCA in which MCCA agrees to merge with, liquidate into, sell substantially all of its assets to or otherwise combine with such third party or (ii) acquires or becomes the beneficial owner of or obtains the right to acquire more than 50% of the issued and outstanding voting securities of MCCA. If MCCA terminates the Merger Agreement because of the failure by BellSouth to obtain a waiver of certain provisions of the MFJ to permit BellSouth to acquire MCCA's interLATA paging operations (other than nationwide network paging operations), BellSouth is required immediately to pay $25 million in cash to MCCA.

In no event shall a party be entitled to terminate the Merger Agreement or to receive a termination fee if it is in material breach under the Merger Agreement.

[Excerpt from Merger Agreement Dated as of February 19, 1988:]

## ARTICLE IX

### Termination

**Section 9.01** *Termination and Abandonment.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time before or after the approval by the shareholders of the Company:

(a) By the mutual consent of Acquisition Sub and the Company by action of their respective Boards of Directors.

(b) By action of the Board of Directors of either Acquisition Sub or the Company, if (i) the Merger shall not have become effective in accordance with its terms on or before the close of business on the first anniversary of the date of the Shareholders Meeting (the "Cut-off Date"), provided that the terminating party is not then in default in the performance of its covenants, agreements, obligations, representations or warranties under this Agreement, and provided further that the "Cut-off Date" has not been extended pursuant to Section 6.11(f), and provided further that if the Effective Time is extended as provided in Section 2.01(b), the Cut-off Date shall also be so extended; or (ii) a Governmental Entity shall have issued an order, decree, or finding or taken any other action permanently restraining, enjoining or otherwise prohibiting the consummation of the Merger, and all times for appeal therefrom shall have expired, or if any appeals are therefrom made, all such appeals shall have been denied.

(c) By action of the Board of Directors of Acquisition Sub, if (i) the Company's shareholders shall have voted at the Shareholders Meeting and not

approved this Agreement, or (ii) the Company shall have materially breached any of its representations and warranties contained in this Agreement or shall have failed to comply in any material respect with any of the other covenants or agreements contained in this Agreement to be complied with or performed by the Company at or prior to the Closing which failure is not cured within thirty (30) days after receipt of notice from BellSouth with respect thereto.

(d) By action of the Board of Directors of the Company, if (i) the shareholders of the Company shall not have approved this Agreement and the transactions contemplated hereby at the Shareholders Meeting duly called pursuant to Section 6.04, or (ii) if BellSouth or Acquisition Sub shall have materially breached any of its representations and warranties contained in this Agreement or shall have failed to comply in any material respect with any of the covenants or agreements contained in this Agreement to be complied with or performed by BellSouth or Acquisition Sub at or prior to the Closing which failure is not cured within thirty (30) days after receipt of notice from the Company with respect thereto.

(e) By action of the Board of Directors of Acquisition Sub, if the Company shall give BellSouth a notice pursuant to Section 6.16, or if the Company is obligated to provide BellSouth with such a notice and the Company has failed to do so.

(f) By the Board of Directors of the Company, if it, in the exercise of its good faith judgment, based upon the advice of counsel, determines that its fiduciary duties to the Company's shareholders require that it (i) not recommend approval of this Agreement by the Company's shareholders, or that it withdraw such recommendation, or (ii) take an action specified in Section 6.01(e)(ii); and BellSouth in either event

shall have received payment in full of the fee referred to in Section 9.04

In the event of any termination and abandonment pursuant to this Section 9.01, no party hereto (or any of its directors, officers, employees or agents or other representatives) shall have any liability or further obligation to any other party to this Agreement, except as provided in Section 10.05 and except that nothing herein will relieve any party from liability for any breach of this Agreement.

**Section 9.02** *Specific Performance and Other Remedies.* The parties hereto each acknowledge that the rights of each party to consummate the transactions contemplated hereby are special, unique and of extraordinary character, and that, in the event that any party violates or fails or refuses to perform any covenant or agreement made by it herein, the non-breaching party may be without an adequate remedy at law. The parties each agree, therefore, that in the event either party violates or fails or refuses to perform any covenant or agreement made by such party herein, the non-breaching party or parties may, subject to the terms of this Agreement and in addition to any remedies at law for damages or other relief, institute and prosecute an action in any court of competent jurisdiction to enforce specific performance of such covenant or agreement or seek any other equitable relief, and each party hereby waives the defense that the other party has an adequate remedy at law.

**Section 9.03** *Rights and Obligations on Termination.* If this Agreement is terminated or abandoned as provided herein, each party hereto will redeliver all documents, work papers and other materials and information, including all copies and summaries thereof, of any other party relating to the transactions contemplated hereby, whether so obtained before or after the execution hereof, to the party furnishing the same, provided, however, that this Section 9.03 shall not apply to any documents, work papers, materials, or information which may be obtained by the parties under other of their existing

agreements or which are a matter of public knowledge or which have heretofore been or are hereafter published in any publication for public distribution or filed as public information with any governmental authority (provided such publication, distribution or filing does not constitute a violation of this Agreement).

**Section 9.04** *Termination Fee.*

(a) Upon the occurrence of both the following events, the Company shall immediately pay to BellSouth a fee of $25 million in cash:

(i) Bell South terminates this Agreement pursuant to Section 9.01(e); and

(ii) at any time prior to or within two (2) years after such termination, any person, corporation, partnership, entity or group (other than BellSouth or an Affiliate of BellSouth) (x) enters into an agreement with the Company in which the Company agrees to merge with, liquidate into, sell substantially all its assets to, or otherwise combine with, any other person, or (y) acquires or becomes the beneficial owner of more than (50%) of the issued and outstanding common stock or voting power of the Company, or is granted or obtains an optional or contractual right, conditional or otherwise, to acquire more than fifty percent (50%) of the outstanding common stock or voting power of the Company; provided, that no payment shall be made to BellSouth if BellSouth or Acquisition Sub shall have breached in any material respect or failed to perform in any material respect any material obligation or covenant contained in this Agreement.

(b) Should the Company terminate this Agreement pursuant to Section 9.01(f), it shall immediately prior to such termination pay to BellSouth a fee of $25 million in cash, provided, that no payment shall be mae to BellSouth if BellSouth or Acquisition Sub shall have breached in any material respect or failed to perform in any material respect any material obligation or covenant contained in this Agreement.

(c) Should this Agreement terminate solely by reason of the failure by BellSouth to satisfy the condition of Section 7.02(d) with respect to waiver of the MFJ to provide interLATA paging, BellSouth shall immediately pay to the Company a fee of $25 million in cash, provided, that no payment shall be made to the Company if the Company or Distribution Sub shall have breached in any material respect or failed to perform in any material respect any material obligation or covenant contained in this Agreement.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

**U.S. Const. Amend. V:**

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

**U.S. Const. Amend. VII:**

> In Suits at common law, . . . the right of trial by jury shall be preserved . . .

**U.S. Const. Amend. XIV, § 1:**

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

**Full Faith and Credit Act, 28 U.S. § 1738:**

> State and Territorial statutes and judicial proceedings; full faith and credit
>
> * * *
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

**Securities Exchange Act of 1934, 15 U.S.C. § 78aa:**

> The district courts of the United States and the United States courts of any Territory or other place subject to the

jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder,and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . .

**Securities Exchange Act of 1934,**
**Section 10, 15 U.S.C. § 78j:**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**Securities Exchange Act of 1934,**
**Section 14a, 15 U.S.C. § 78n:**

It shall be unlawful for any persons, by the use of the mails or by any means or instrumentality or interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

**Securities and Exchange Commission Rule 10b-5:**

Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

**Securities and Exchange Commission Rule 14a-9:**

False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.